APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-75

THE STATE OF GEORGIA, *et al.*,
Appellants,

v.

THE UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Jurisdictional Statement Filed July 14, 1972
Probable Jurisdiction Noted October 16, 1972

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IN THE

United States District Court

FOR THE NORTHERN DISTRICT OF GEORGIA

ATLANTA DIVISION

UNITED STATES OF AMERICA,
Plaintiff,

v.

THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and member of the State Election Board; WILLIAM E. BLANKS, M. M. SMITH, MATTHEW PATTON, MELBA WILLIAMS, Members; THE STATE DEMOCRATIC EXECUTIVE COMMITTEE, CHARLES H. KIRBO, Chairman; THE STATE REPUBLICAN EXECUTIVE COMMITTEE, ROBERT J. SHAW, Chairman,

Defendants.

CIVIL ACTION NO. 16373

COMPLAINT

[Filed March 27, 1972]

[R. 4]

The United States of America, plaintiff herein, alleges:

1. This action is brought by the Acting Attorney General on behalf of the United States pursuant to Section 5 and Section 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973c and 1973j(d), and in order to secure rights

guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and Section 12(f) of the Voting Rights Act of 1965, 42 U.S.C. 1973j(f).

3. The General Assembly is vested by the Constitution of the State of Georgia with the legislative power of the State and therefore with the power to reapportion House Districts and to promulgate laws with respect to the procedures and requirements for election to the Georgia House of Representatives. Constitution of the State of Georgia, §§2-1301, 2-1502, 2-1920.

4. Defendant Jimmy Carter is sued in his capacity as governor of Georgia and the chief executive officer of the State. He is vested by the laws and Constitution of the State of Georgia with the responsibility of executing the laws of the State of Georgia, including certain acts of the Georgia General Assembly pertaining to elections. Constitution of the State of Georgia, §§2-3001, 2-3012; Georgia Code §34-805.

5. Defendant Ben W. Fortson, Jr. is sued in his capacity as Secretary of State for the State of Georgia. He is vested by law with the obligation to perform certain acts in regard to the conduct of primary and general elections. Georgia Code §34-301. Defendant Fortson is also sued as a member of the State Election Board, which is directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§34-201 *et seq.*

6. Defendants William E. Blanks, M. M. Smith, Matthew Patton, and Melba Williams are sued in their capacities as members of the State Election Board. As such

they are directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§34-201 *et seq.*

7. Defendants Charles H. Kirbo and Robert J. Shaw are sued in their capacities as the chairmen of the State Democratic Executive Committee and the State Republican Executive Committee, respectively, and as such are representatives of the only permanently registered political parties for the purposes of conducting primaries in Georgia. They are directed by law to perform certain functions in regard to the conduct of elections in the State of Georgia. Georgia Code §§34-905, 34-1004, 34-1005, 34-1006.

8. The provisions of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, apply to the State of Georgia.

9. The State of Georgia, through its Attorney General, submitted to the United States Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, the reapportionment proposals for the House of Representatives of the General Assembly. This submission was completed on January 6, 1972; and on March 3, 1972 the United States Attorney General interposed an objection to the reapportionment plan for the House of Representatives. Copies of the House reapportionment plan submitted on January 6 and of the March 3 objection letter are attached as Exhibits 1 and 2, respectively.

10. The Georgia General Assembly passed a new reapportionment plan for the House on March 9, 1972. A copy of this new plan is attached as Exhibit 3. The new plan retains 31 multi-member districts and the numbered post provision and does not provide for the elimination

of the majority (runoff) requirement for being elected to the House. The new plan was submitted to the Attorney General under Section 5 of the Voting Rights Act on March 15, 1972, and was objected to by him on March 24, 1972 (Exhibit 4).

11. The Georgia House of Representatives on March 9, 1972 adopted a resolution (H.R. No. 956—Exhibit 5) which stated, *inter alia:*

> NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority vote.

12. The General Assembly's failure to enact a new reapportionment plan for the House of Representatives which fairly meets the objections of the Attorney General of the United States under Section 5 of the Voting Rights Act, and its adoption of the resolution referred to in Paragraph 11 above, constitute reasonable grounds to believe that the defendants, unless restrained and enjoined by this Court, will enforce or seek to administer a standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, in violation of Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

13. The reapportionment plan for the Georgia House which was in effect immediately prior to the plan adopted by the General Assembly on October 14, 1971 (Exhibit 1) was malapportioned under the Fourteenth Amendment and would therefore be invalid for use in the 1972 elections. The State of Georgia recognized this fact when

it stated, through its Attorney General, in its submission under Section 5 of the October 14, 1971 House plan:

> The reason for the adoption of this reapportionment plan was the change in population and population distribution since the last reapportionment. Because of these changes, reapportionment was necessary if the House were to meet the one man-one vote standard.

A copy of that part of Georgia's submission containing the above statement is attached as Exhibit 6.

14. Under Georgia law, candidates for the Georgia House must commence qualifying for the August 8 primary no later than May 31, 1972; and all political parties must close their qualifications for the primary on June 14, 1972. Georgia law also requires that any alterations in precinct boundaries occasioned by changes in the House districts must be made by the county ordinaries by June 9, 1972, and that candidates for the House must file their notices of candidacy for the November 7 general election by August 24, 1972.

WHEREFORE, plaintiff prays that this matter be given expedited consideration and that a court of three judges hear this action pursuant to 28 U.S.C. 2284 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, and thereafter issue a judgment;

> (a) Enjoining the defendants from implementing or seeking to administer the reapportionment plans for the Georgia House of Representatives adopted by the General Assembly on October 14, 1971 and March 9, 1972 (Exhibits 1 and 3) and objected to by the Attorney General on March 3, 1972 and March 24, 1972, respectively; and

(b) Directing the General Assembly to adopt a House reapportionment plan which conforms to the Fourteenth and Fifteenth Amendments of the federal Constitution and which meets the objections made on behalf of the Attorney General of the United States under Section 5 of the Voting Rights Act; or, alternatively, that this Court devise such a plan, through the appointment of a special master or otherwise, and direct the defendants to implement such plan either permanently (until the next decennial Census) or on an interim basis for the 1972 elections.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

/s/ RICHARD G. KLEINDIENST
RICHARD G. KLEINDIENST
Acting Attorney General
/s/ DAVID L. NORMAN
DAVID L. NORMAN
Assistant Attorney General
/s/ JOHN W. STOKES, JR.
JOHN W. STOKES, JR.
United States Attorney
/s/ GERALD W. JONES
GERALD W. JONES
/s/ WALTER GORMAN
WALTER GORMAN
/s/ HARRY C. PIPER
HARRY C. PIPER
Attorneys
Department of Justice
Washington, D. C. 20530

[Complaint Exhibit 1, R. 21, omitted in printing]

[Complaint Exhibit 2; R. 52]

DEPARTMENT OF JUSTICE
WASHINGTON, D.C. 20530

MARCH 3, 1972

Honorable Arthur K. Bolton
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This is in reference to the enactments amending Sections 47-101 and 47-102 of the Georgia Code reapportioning districts for the Georgia House and Senate. These reapportionment enactments, which were submitted pursuant to Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c, were initially received by the Department of Justice on November 5, 1971. Additional requested material necessary to complete the submission was received by this Department on January 6, 1972. Under departmental guidelines, the Attorney General's response thus is due on March 6, 1972. Both plans adopt changes in election procedures different from those in effect on November 1, 1964 and, therefore, are properly submitted to the Attorney General under Section 5 of the Voting Rights Act.

As I have indicated on other occasions, we are aware of the inherent difficulties faced by a legislature in devis-

ing comprehensive reapportionment plans such as those here involved. For that reason, and insofar as time limitations have allowed, we have studied both plans in every detail. As a result we find no basis for objecting to any of the plan for the Senate except proposed Senate Districts 36 (in Fulton County) and 22 (in Richmond County). With respect to those, after careful review of all the information available to us we have been unable to conclude, as we must under the Voting Rights Act, that the boundaries of these proposed districts will not have a discriminatory racial effect on voting by minimizing or unnecessarily diluting black voting strength in those areas.

With respect to the reapportionment plan for the House of Representatives, a careful analysis and review of the demographic facts and recent court decisions identify several significant issues. Forty-nine of the 105 districts in the plan are multi-member and we note that it contains a requirement that candidates in those districts must run for numbered posts. We also note that existing Georgia law requires a run off in the event no candidate receives a majority of votes in either a primary or a general election. We note further that of the 105 districts 52 are made up of portions of a county, including 31 of the multi-member districts. These facts suggest that the state's traditional policy of maintaining county lines in designing legislative districts has been significantly modified.

An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgment

of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting. The reasoning of these recent cases is illustrated by the decision of the federal district court in North Carolina which commented with respect to numbered posts in multi-member districts "It is clear that the numbered seat law may have the effect of curtailing minority voting power." (*Scott* v. *Dunston*, E.D.N.C. No. 2666-Civil, Slip Opinion, n. 9 at p. 17, (Jan. 10, 1972). Similarly, the three-judge court considering the Texas legislative reapportionment found both the majority run-off and the numerical post requirement tended to abridge minority voting power and "highlight the racial element where it does exist." *Graves* v. *Barnes*, W.D. Tex., No. A-17-CA-142, Slip Op. at p. 38. See, also, *Sims, Farr, and U.S.A.* v. *Amos*, No. 1744-N, (M.D. Ala., January 3, 1972); *Bussie* v. *The Governor of Louisiana*, No. 71-202 E.D. La., August 24, 1971).

Our analysis further reveals that there is a bloc of adjoining majority-black counties in east central Georgia including Greene, Taliaferro, Hancock, Warren, Washington, Jefferson and Burke Counties. Under the plan in effect on November 1, 1964, each of these counties was represented by one member of the House. Under the present House plan, there are four majority-black, single-member districts in the area—District 28 (Putnam and Hancock Counties), District 35 (Washington County), District 36 (Jefferson County), and District 37 (Burke County). These districts, coupled with the adjoining majority-black counties of Green, Taliaferro and Warren, form a contiguous group—of 89,626 persons, of whom 57.2 percent are nonwhite—enough to form at least three new majority-nonwhite single-member districts. Yet the

submitted plan has only one district in the area with a slight nonwhite population majority (50.56 percent)—new District 59. The other new districts (60, 63, 64, 76 and 78) are "border districts" partly inside and partly outside the majority-nonwhite area and have significant, but minority, nonwhite population percentages. These demographic facts, in the context of a plan that frequently cuts across county lines, do not permit us to conclude, as we must under the Voting Rights Act, that this plan does not have a discriminatory racial effect on voting.

For the foregoing reasons, I must on behalf of the Attorney General interpose an objection to changes submitted by these reapportionment plans. We have reached this conclusion reluctantly because we fully understand the complexities facing any state in designing a reapportionment plan to satisfy the needs of the state and its citizens, and, simultaneously, to comply with the mandates of the Federal Constitution and laws. We are persuaded, however, that the Voting Rights Act compels this result.

Of course, Section 5 permits seeking approval of all changes affecting voting by the United States District Court for the District of Columbia irrespective of whether the changes have previously been submitted to the Attorney General.

Sincerely,

/s/ DAVID L. NORMAN

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

[Complaint Exhibit 3, R. 56, omitted in printing]

[Complaint Exhibit 4; R. 89]

MARCH 24, 1972

Honorable Arthur K. Bolton
Attorney General
State of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Dear Mr. Attorney General:

This is in reference to the March 14, 1972 letter from your office submitting to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, H.B. 2085, S.B. 690 and H.B. 1862 which reapportion the Georgia Senate, the Georgia House of Representatives, and the Congressional Districts, respectively.

After a careful analysis of the Act redistricting the Georgia House of Representatives, I must conclude that this reapportionment does not satisfactorily remove the features found objectionable in your prior submission, namely, the combination of multi-member districts, numbered posts, and a majority (runoff) requirement discussed in my March 3, 1972, letter to you interposing an objection to your earlier Section 5 submission. Accordingly, and for the reasons enunciated in my March 3, 1972, letter I must, on behalf of the Attorney General, object to S.B. 690 reapportioning the Georgia House of Representatives.

Our examination of the new reapportionment of the Senate (H.B. 2085) and Congressional Districts (H.B.

1862) is continuing on an expedited basis, and you will be advised as soon as a decision is made on these enactments.

Sincerely,

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

[Complaint Exhibit 5; R. 93]

H. R. No. 956

By: Messrs. Smith of the 43rd, Murphy of the 19th, Busbee of the 61st, Edwards of the 45th, Lee of the 21st, Roach of the 10th, Dailey of the 53rd and many many others

A RESOLUTION

To invoke the remedial power of the Federal Courts in resolving the untimely dilemma facing the House of Representatives and the electorate of this State regarding reapportionment; and for other purposes.

WHEREAS, the General Assembly of Georgia, meeting in Extraordinary Session, reapportioned itself on a one man, one vote basis in accordance with the 1070 census; and

WHEREAS, acting under Section 5 of the Voting Rights Act of 1965, the Justice Department has interposed an objection to the reapportionment plan of the Georgia House of Representatives; and

WHEREAS, Section 5 of the Voting Rights Act is applicable primarily to the Southern States; and

WHEREAS, the late Mr. Justice Black, dissenting in *Allen v. State Board of Elections,* 393 U. S. 544, has said of Section 5:

> "It seems to me it would be wise for us to pause now and then and reflect on the fact that the separate Colonies were passing laws in their legislative bodies before they themselves created this Union, that history emphatically proves that in creating the Union the Colonies intended to retain their original inde-

pendent power to pass laws, and that no justification can properly be found in the Constitution they created or in any amendment to it for degrading these States to the extent that they cannot even initiate an amendment to their constitution or their laws without first asking the permission of a federal court in the District of Columbia or a United States governmental agency."; and

WHEREAS, the late Mr. Justice Black, in a prior dissent in *South Carolina v. Katzenbach*, 383 U.S. 301, said:

"Certainly if all the provisions of our Constitution which limit the power of the Federal Government and reserve other power to the States are to mean anything, they mean at least that the States have power to pass laws and amend their constitutions without first sending their officials hundreds of miles away to beg federal authorities to approve them."; and

WHEREAS, the U. S. Supreme Court has heretofore nullified sophisticated as well as simple minded discrimination; and

WHEREAS, said Section 5 constitutes sophisticated discrimination against the Southern States; and

WHEREAS, the Assistant Attorney General, Civil Rights Division, has stated that he is unable to conclude that the plan of reapportionment of this House does not have a discriminatory racial effect on voting; and

WHEREAS, said Assistant Attorney General is persuaded that a court would conclude that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement would occasion a potential abridgement of minority voting rights; and

WHEREAS, Mr. Chief Justice Warren stated in *Allen v. State Board of Elections*, 393 U.S. 544, that the Attorney General does not act as a court in approving or disapproving legislation; and

WHEREAS, the U. S. Attorney General's office is acting as a court in this instance; and

WHEREAS, the U. S. Attorney General's office lacks the power of a court to remedy the hiatus now existing; and

WHEREAS, this House of Representatives had 45 multi-member districts, numbered posts and a majority (runoff) requirement in the reapportionment plan adopted in 1965; and

WHEREAS, this House of Representatives had 47 multi-member districts, numbered posts and a majority (runoff) requirement in the reapportionment plan adopted in 1968, which plan was approved by the Federal Court; and

WHEREAS, the use of multi-member districts, numbered posts and majority (runoff) requirement in electing members of this House has not changed; and

WHEREAS, the extent of the U. S. Attorney General's authority is to approve or disapprove *changes;* and

WHEREAS, the Attorney General has known since the beginning of this Regular Session of the General Assembly in January, 1972, that the plan of reapportionment for this House contained multi-member districts, numbered posts, and a majority (runoff) requirement; and

WHEREAS, the Justice Department waited until the final days of this Regular Session to notify us of its disapproval; and

WHEREAS, the House of Representatives is required by the Courts, on the one hand, to make a good-faith effort to achieve precise mathematical equality between districts, which this House has done; and

WHEREAS, the House of Representatives is required, on the other hand, to satisfy the Attorney General that the change does not have a racially discriminatory purpose or effect; and

WHEREAS, after diligent efforts this House has been unable to satisfy both the requirement of the Courts and of the Attorney General; and

WHEREAS, the House of Representatives lacks the time to satisfy the Attorney General before the upcoming primaries and elections; and

WHEREAS, the remedial powers of the courts are needed to resolve these issues;

NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority vote.

BE IT FURTHER RESOLVED that the Clerk of the House of Representatives is instructed and directed to transmit a copy of this Resolution to the Attorney General of the United States.

[Complaint Exhibit 6; R. 98]

Submission by the State of Georgia to the Attorney General of the United States For Approval of an Act Reapportioning the Georgia House of Representatives

ARTHUR K. BOLTON

Attorney General of Georgia
132 State Judicial Building
Atlanta, Georgia 30334

Now comes the State of Georgia by and through its Attorney General and respectfully requests the approval of the Attorney General of the United States of the following reapportionment plan for the Georgia House of Representatives.

I.

This application and submission is made pursuant to § 5 of the Voting Rights Act of 1965, Public Law 89-110, August 6, 1965, 42 U.S.C. § 1973(c) and the regulations promulgated Friday, September 10, 1971, in 28 CFR, § 51.

II.

In compliance with 28 CFR, § 51.10(a), this submission includes:

1) A copy of the reapportionment act for the Georgia House of Representatives certified by the Secretary of State. (Exhibit A).

2) The date of final adoption of the act was October 14, 1971.

3) The change was made by the General Assembly of Georgia.

4) The act was adopted in order to ensure that the apportionment of the Georgia House of Representatives corresponds to the one man-one vote standard enunciated by the United States Supreme Court. The difference between the old and new law is that the new apportionment act establishes districts which are very nearly equal in population. The General Assembly used the 1970 census figures for calculation and contracted with the computer center at the University of Georgia to assist with calculation of population data for each proposed plan.

5) This act has not yet taken effect.

III.

As suggested by 28 CFR, § 51.10(b), the following is also respectfully submitted in order to facilitate the approval of the reapportionment plan:

1) The reason for the adoption of this reapportionment plan was the change in population and population distribution since the last reapportionment. Because of these changes, reapportionment was necessary if the House were to meet the one man-one vote standard.

2) The only anticipated effect of the new plan is that it will ensure equal representation for all citizens throughout the State. (Exhibit B shows the population variances for each district).

3) There is no pending litigation concerning the newly

adopted reapportionment plan for the Georgia House of Representatives.

4) The Georgia House of Representatives also reapportioned in 1968. This change was not submitted because at that time, prior to *Allen v. Board of Elections*, 393 U.S. 544 (1969), it was believed to be unnecessary to submit reapportionment plans to the United States Attorney General pursuant to the Voting Rights Act of 1965. Further, the 1968 reapportionment was required by court order issued in *Toombs v. Fortson*, 277 F. Supp. 821 (N.D. Ga. 1967), by order dated February 7, 1967. See *Connor v. Johnson*, 402 U.S. 690 (1971). (A copy of the 1968 act is attached as Exhibit C).

5) Maps are included as Exhibit D showing the old and new districts. In metropolitan areas detailed maps are submitted to show the exact location of the new boundaries. Such detailed maps for the old boundaries are unavailable at the present time.

iv-v) The figures concerning racial distribution within the districts are available from the Bureau of the Census. Those figures were not used by the General Assembly to calculate the new districts. The General Assembly contracted with the computer center at the University of Georgia to assist in establishing equal districts. The contract specifically prohibited the Center from programming racial data (Exhibit E is a newspaper article describing this contract.)

vi) The maps included as Exhibit D show the new boundaries drawn according to the various divisions chosen by the Bureau of the Census. This was done so that the population figures for each district could

be readily calculated. The Census maps often rely on natural boundaries but such boundaries are not shown on the available maps. The basic plan was to maintain the integrity of the counties, where possible. Where it was necessary to divide a county, the breakdown was according to census county division, census tract, enumeration district, or in a few instances, census blocks.

6) i) Population information by race may be obtained from the Bureau of the Census.

ii) The voting age population by race can be calculated from the data of the Bureau of the Census. This information was unavailable to the Georgia General Assembly since it was not programmed on the computer. (See § 5(iv) above for explanation). The number of registered voters, by race, is not calculated on a state-wide basis. Such information is available only on the voter registration cards in each county.

iii) The General Assembly was not supplied by the computer center with estimates of population by race. It was believed that the use of such data might itself be constitutionally impermissible. The only available source for population data by race would have been the data of the Bureau of the Census.

7) The following evidence of public notice and participation is respectfully submitted or is unavailable for submission.

i) Newspaper articles are attached as Exhibit F.

ii) Announcements of public hearings are attached as Exhibit G.

iii) Newspaper accounts of some public hearings are attached as Exhibit H.

iv) Public statements and speeches are unavailable except as they may be included in the newspaper articles submitted.

v) Comments from the general public are unavailable except as shown by the newspaper articles in Exhibit H which give accounts of public hearings.

vi) The House Journal does not contain information of this type; however, the Georgia Public Television station made tapes of excerpts of most speeches on the floor of the House and Senate. These T.V. tapes have not been transcribed and thus are not available for submission.

The above information is submitted by the Attorney General of the State of Georgia to show that the reapportionment plan was intended to ensure the proportionate representation of all citizens of the State and was not intended and does not have the effect of diluting or debasing the vote of any citizen.

Respectfully submitted,
/s/ ARTHUR K. BOLTON
ARTHUR K. BOLTON
Attorney General

[Submission exhibits A-H omitted from Complaint]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

DEFENSES AND ANSWER OF THE STATE OF GEORGIA, ET AL.

[Filed March 31, 1972; R. 106]

Come now the defendants State of Georgia, the General Assembly of Georgia, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and State Election Board Members William F. Blanks, M. M. Smith, Matthew Patton, and Melba Williams, and respond to the complaint as follows:

DEFENSES

1.

The complaint fails to state a claim upon which relief can be granted, for the reason that:

(a) The basis of the complaint is that the U. S. Attorney General interposed objections to the use of multi-member districts, numbered posts, and the majority (runoff) requirement in the reapportionment of the Georgia House of Representatives.

(b) Before and since November 1, 1964, and the passage of the Voting Rights Act of 1965 (42 U.S.C. § 1973), Georgia was using and has continued to use multi-member districts, posts, and the majority (runoff) requirement in the House of Representatives.

(c) Under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), the U. S. Attorney General has authority to interpose objections only when a state

seeks to administer a practice or procedure with respect to voting different from that in force or effect on November 1, 1964; i.e., the Attorney General has authority to object only to "changes" in a state's election laws.

(d) There having been no change in Georgia's having used multi-member districts, posts, and majority (runoff) requirement since prior to November 1, 1964, the U. S. Attorney General was and is without authority to object thereto.

2.

The complaint fails to state a claim upon which relief can be granted, because the test applied by the U. S. Attorney,—upon which he disapproved the use of multi-member districts, numbered posts and majority (runoff) requirement,—is invalid, for the reason that the Attorney General did not find that such use would have a racially discriminatory effect; he found only that he was unable to conclude that it did not have a discriminatory racial effect, which test is invalid under Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c).

3.

The complaint fails to state a claim upon which relief can be granted for the reasons that Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c):

(a) Is not applicable to state reapportionment acts;

(b) Is unconstitutional if applied to state reapportionment acts, in that such application of Section 5 violates:

(1) Article IV, Section 4 of the Constitution which provides that "The United States shall guar-

antee to every state in this Union a Republican Form of Government . . ." in that the action of the Attorney General in disapproving a State reapportionment plan leaves the State without a Republican Form of government;

(2) Article IV, Section 1 of the Constitution which provides that "Full Faith and Credit shall be given in each State to the public Acts, Records and Judicial Proceedings of every other State" in that, by said Section 5 the Congress has denied full faith and credit to election law changes enacted by Georgia;

(3) Article IV, Section 2 of the Constitution which provides that "The Citizens of each State shall be entitled to all the Privileges and Immunities of Citizens in the several States", and the Ninth and Tenth Amendments which reserve to the States and their people powers not delegated to the United States, in that by said Section 5 the Congress has denied to certain States and their people the right to enact changes in their election laws.

(c) Is unconstitutional on its face for each of the reasons specified herein above.

4.

The complaint fails to state a claim upon which relief can be granted, in that, even if the House reapportionment plan adopted March 9, 1972 (Exhibit 3 to the complaint) were validly disapproved by the U. S. Attorney General, the House reapportionment plan adopted October 14, 1971 (Exhibit 1 to the complaint) would be in effect, for the reason that it was submitted to the Attorney

General on November 5, 1971 (as shown on the face of the complaint, Exhibit 2) and his purported disapproval thereof did not occur until March 3, 1972 (complaint, Exhibit 2), not within the sixty (60) days provided by Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), and hence said reapportionment plan adopted October 14, 1971, is validly in effect for the 1972 elections of members of the Georgia House of Representatives.

ANSWER

Responding to the allegations of the complaint, these defendants answer as follows:

1. These defendants admit the allegations of paragraph one (1) of the complaint, except as said admission may be contrary to the defenses herein set forth.

2. The allegations of paragraph two (2) of the complaint are admitted.

3. The allegations of paragraph three (3) of the complaint are admitted, except that these defendants show that the power vested by the Georgia Constitution in the General Assembly to reapportion House districts and to promulgate election laws has been unconstitutionally negated and impaired by Section 5 of the Voting Rights Act of 1965 as shown by Defense No. 3 hereinabove set forth.

4. The allegations of paragraph four (4) of the complaint are admitted. Responding further to said allegations, defendant Carter shows that he is also a citizen and registered voter, and that he asserts both his personal and official rights in his defenses to the complaint.

5. The allegations of paragraph four (4) of the complaint are admitted. Responding further to said allega-

tions, defendant Fortson shows that he is also a citizen and registered voter, and that he asserts both his personal and official rights in his defenses to the complaint.

6. The allegations of paragraph six (6) of the complaint are admitted for the purposes of this litigation.

7. The allegations of paragraph seven (7) of the complaint are admitted on information and belief.

8. The allegations of paragraph eight (8) of the complaint are admitted, except as said admission is contradicted by the defenses herein set forth.

9. The allegations of paragraph nine (9) of the complaint are admitted, except that defendants show that the submission was completed on November 5, 1971. Defendants incorporate herein their Defense No. 4, and attach hereto as Exhibit A a copy of said submission of November 5, 1971.

10. The allegations of paragraph ten (10) of the complaint are admitted.

11. The allegations of paragraph eleven (11) of the complaint are admitted.

12. The allegations of paragraph twelve (12) of the complaint are admitted, except that defendants deny that the use of multi-member districts, numbered posts and the majority (runoff) requirement is a standard, practice or procedure different from that in force or effect on November 1, 1964 (see Defense No. 1 above, which defendants incorporate herein by reference), and deny that such use is in violation of Section 5 of the Voting Rights Act of 1965.

13. The allegations of paragraph thirteen (13) of the complaint are admitted. Responding further to said al-

legations, defendants incorporate herein by reference their Defense No. 4.

14. The allegations of paragraph fourteen (14) of the complaint are admitted for the purposes of this litigation. Responding further to said allegations, defendants show that the Republican Party has set May 15, 1972, as the first day for qualifying for the Republican primary, and the Democratic Party has set May 17, 1972, as the first day for qualifying for the Democratic primary.

WHEREFORE, these defendants pray that the court of three judges issue judgment:

(a) Sustaining each and all of defendants' four defenses; and

(b) Denying plaintiff's prayers for injunction.

Respectfully submitted,

[Signatures omitted in printing]

[Exhibit A omitted in printing]

[Certificate of Service omitted in printing]

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

STIPULATION

[Filed April 14, 1972; R. 306]

Plaintiff, the United States of America, through its attorneys, and defendants State of Georgia, the General Assembly of Georgia, Governor Jimmy Carter, Secretary of State Ben W. Fortson, Jr., and State Election Board members William F. Blanks, M. M. Smith, Matthew Patton and Melba Williams (hereinafter referred to collectively as defendants) through their attorneys, stipulate to the following matters for the purpose of this litigation and subject to the Defenses of the State of Georgia heretofore filed:

1. This action is brought by the Acting Attorney General on behalf of the United States pursuant to Section 5 and Section 12(d) of the Voting Rights Act of 1965, 42 U.S.C. 1973c and 1973j (d), and in order to secure rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction of this action pursuant to 28 U.S.C. 1345 and Section 12(f) of the Voting Rights Act of 1965, 42 U.S.C. 1973j(f).

3. The General Assembly is vested by the Constitution of the State of Georgia with the legislative power of the State and therefore with the power to reapportion House Districts and to promulgate laws with respect to the procedures and requirements for election to the Georgia House

of Representatives. Constitution of the State of Georgia, §§ 2-1301, 2-1502, 2-1920.

4. Defendant Jimmy Carter is sued in his capacity as Governor of Georgia and the chief executive officer of the State. He is vested by the laws and Constitution of the State of Georgia with the responsibility of executing the laws of the State of Georgia, including certain acts of the Georgia General Assembly pertaining to elections. Constitution of the State of Georgia, §§ 2-3001, 2-3012; Georgia Code § 34-805. Defendant Carter is a citizen and registered voter of the State of Georgia.

5. Defendant Ben W. Fortson, Jr., is sued in his capacity as Secretary of State for the State of Georgia. He is vested by law with the obligation to perform certain acts in regard to the conduct of primary and general elections. Georgia Code § 34-301. Defendant Fortson is also sued as a member of the State Election Board, which is directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§ 34-201 *et seq.* Defendant Fortson is a citizen and registered voter of the State of Georgia.

6. Defendants William E. Blanks, M. M. Smith, Matthew Patton, and Melba Williams are sued in their capacities as members of the State Election Board. As such they are directed by Georgia law to supervise all elections in the State of Georgia. Georgia Code §§ 34-201 *et seq.* They are citizens and registered voters of the State of Georgia.

7. The State of Georgia is one of those States with respect to which the prohibitions of Section 4(b) of the Voting Rights Act of 1965 (42 U.S.C. § 1973b(b)) are

in effect within the meaning of Section 5 of that Act (42 U.S.C. § 1973(c)).

8. On September 10, 1971, the "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" were published in the Federal Register, Vol. 36, No. 176. Prior to the preparation of any materials with respect to a reapportionment plan for the Georgia House of Representatives for submission to the United States Attorney General, the Georgia Attorney General's office was aware of the existence of these regulations and was in possession of one or more copies thereof. A true copy of these regulations is attached hereto as Stipulation Exhibit A.

9. The United States Attorney General received on November 5, 1971, from the State of Georgia, through its Attorney General, the October 14, 1972, reapportionment act for the House of Representatives of the General Assembly, as shown by its "Submission", true copies of which appear as Exhibit 6 to the Complaint and as Exhibit A to the Defendants' Answer. This "Submission" included the October 14, 1971, House reapportionment act (a true copy of which appears as Exhibit 1 to the Complaint), included the population variances referred to in paragraph III(2) (a true copy of which appears as Exhibit B to Defendants' Answer) of the "Submission", included statewide maps of the old (1968) and new (1971) districts (true copies of which appear as Stipulation Exhibits B and C, respectively, attached hereto), and included the other maps and materials referred to in said "Submission", which maps and materials can be made available to the Court upon request.

10. By letter dated November 19, 1971, signed by Mr. David L. Norman, Assistant Attorney General, Civil

Rights Division, Department of Justice, additional information to complete the "Submission" was requested. A true copy of said November 19, 1971, letter is attached hereto as Stipulation Exhibit D. Said additional information was received by Mr. Norman on January 6, 1972, under cover letter from the Georgia Attorney General, a true copy of which is attached hereto as Stipulation Exhibit E. The materials referred to in said Stipulation Exhibit E can be made available to the Court upon request.

11. By letter dated March 3, 1972, the Department of Justice interposed an objection to the October 14, 1971, reapportionment plan for the House of Representatives. A true copy of said letter of March 3, 1972, appears as Exhibit 2 to the Complaint.

12. On the last day of its regular 1972 session, the Georgia General Assembly passed a new reapportionment plan for the House on March 9, 1972. A true copy of this March 9, 1972, plan appears as Exhibit 3 to the Complaint. The new plan retains 31 multi-member districts and the numbered post provision and does not provide for the elimination of the majority (runoff) requirement for being elected to the House. The new plan was submitted to the U. S. Attorney General under Section 5 of the Voting Rights Act on March 15, 1972. This "Submission" included the map of the new plan attached hereto as Stipulation Exhibit F. The "Submission" and other materials submitted on March 15, 1972, can be made available to the Court upon request. The March 9, 1972, plan was objected to by letter dated March 24, 1972, a true copy of which appears as Exhibit 4 to the Complaint.

13. The Georgia House of Representatives on said

March 9, 1972, adopted a resolution (H.R. No. 956) which stated, *inter alia:*

> NOW, THEREFORE, BE IT RESOLVED BY THE HOUSE OF REPRESENTATIVES that in order to invoke the remedial powers of the Federal Courts, this Body does at this time respectfully decline to abandon multi-member districts, numbered posts and election by majority vote.

A true copy of said Resolution appears as Exhibit 5 to the Complaint.

14. The General Assembly's failure to enact a new reapportionment plan for the House of Representatives meeting the objections of the Attorney General of the United States, and its adoption of the resolution referred to in paragraph 13 above, constitute reasonable grounds to believe that the defendants, unless restrained and enjoined by this Court, will enforce or seek to administer the House reapportionment plan enacted on March 9, 1972.

15. The 1968 reapportionment plan for the Georgia House which was in effect immediately prior to the plan adopted by the General Assembly on October 14, 1971, was malapportioned under the Fourteenth Amendment and would therefore be invalid for use in the 1972 elections. The State of Georgia recognized this fact when it stated, through its Attorney General, in its submission under Section 5 of the October 14, 1971 House plan:

> The reason for the adoption of this reapportionment plan was the change in population and population distribution since the last reapportionment. Because of these changes, reapportionment was necessary if

the House were to meet the one man-one vote standard.

A true copy of that part of Georgia's submission containing the above statement is attached to the Complaint as Exhibit 6.

16. Under Georgia law, candidates for the Georgia House may commence qualifying for the August 8 primary as early as May 15, 1972, the first day for qualifying for the Republican primary, or May 17, 1972, the first day for qualifying for the Democratic primary, and all political parties must close their qualifications for the primary on June 14, 1972. Georgia law also requires that any alterations in precinct boundaries occasioned by changes in the House districts must be made by the county ordinaries by June 9, 1972, and that candidates for the House must file their notices of candidacy for the November 7 general election by August 24, 1972.

17. The parties stipulate that the Court may take judicial notice of Georgia law, including but not limited to, the following:

Reapportionment acts:

1961 Ga. Laws, p. 111.
1965 Ga. Laws, p. 127.
1967 Ga. Laws, p. 187.
1968 Ga. Laws, p. 209.

Designated post requirement:

1953 Ga. Laws, Nov. Sess., p. 269, Code Ann. § 47-119.
1964 Ga. Laws, Ex. Sess., p. 26 at p. 89.
1965 Ga. Laws, p. 127 at pp. 172-173.

1967 Ga. Laws, p. 187 at p. 219.
1968 Ga. Laws, p. 209 at p. 246.

Majority (runoff) election requirement:
1962 Ga. Laws, pp. 1217, 1218; Code Ann. § 34-3212(c).
1964 Ga. Laws, Ex. Sess., p. 26 at pp. 174-175.

18. The parties stipulate that the Court may take judicial notice of the case of *Toombs v. Fortson*, including but not limited, to the following:

Toombs v. Fortson, 241 F.Supp. 65 (1965).
Toombs v. Fortson, 275 F.Supp. 128 (1966).
Toombs v. Fortson, 384 U.S. 210 (1966).
Toombs v. Fortson, 277 F.Supp. 821 (1967).
Toombs v. Fortson, Final Judgment dated May 13, 1968, a true copy of which is attached hereto as Stipulation Exhibit G.

19. This Stipulation may be supplemented by agreement of the parties or evidence may be offered if a need therefore arises.

This 14th day of April, 1972.

[Signatures omitted in printing]

[Stipulation Exhibit A, R. 313, omitted in printing; see 28 C.F.R. 51]

[STIPULATION EXHIBIT D; R. 320]

DEPARTMENT OF JUSTICE

WASHINGTON

NOVEMBER 19, 1971

Honorable Arthur K. Bolton
Attorney General
State of Georgia
State Judicial Building, Room 132
Atlanta, Georgia 30334

Dear Mr. Attorney General:

I am writing in reference to the redistricting plans for Georgia's House and Senate districts and Congressional districts, submitted pursuant to Section 5 of the Voting Rights Act of 1965, and received by this Department on November 5, 1971. This letter also confirms telephone conversations between Mr. Harold N. Hill of your office and departmental attorney Harry Piper on November 12, 1971, and between Dorothy Y. Kirkley of your office and Mr. Piper on November 19, 1971.

After a preliminary examination of the initial submission, this Department has determined that the data sent to the Attorney General are insufficient to evaluate properly the changes you have submitted. In accordance with Sections 51.10(a)(6) and 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965 (36 Federal Register 18186-18190, September 10, 1971), would you please assist us by providing this Department the following additional information:

1. The 1970 Census population, by race, for the 1964, 1968, and submitted (1971) State House and Senate dis-

tricts, and for the old (1964) and new (submitted) Congressional districts.

2. 1970 Census maps showing the precise district boundaries for any submitted State Senate or State House district which divides any county or city. (Such maps have already been submitted for the metropolitan areas of Atlanta, Savannah, Augusta, Columbus, and Cobb County for submitted House districts and for the metropolitan areas of Atlanta, Albany, Macon, Augusta, Savannah, and Columbus for submitted Senate districts).

3. Maps showing the precise district boundaries for any State Senate or State House district in the 1968 redistricting plan which divides any county or city.

4. A statewide map showing the State Senate and State House Districts in the 1964 redistricting plan, and maps showing the precise district boundaries for any such districts which divided any county or city.

5. A history (for the last two elections) of every primary or general election contest for State Senate, State House, and for United States Congress in which there were one or more black candidates running. This history should include for each such contest the district involved, the names of the candidates (designated by race), and the number of votes received by each candidate.

6. The name, home address, and race of each present State Senator, State (House) representative, and U. S. Congressman from Georgia.

7. A legislative history of each submitted redistricting plan (the names of the sponsoring legislators for each of the three final bills, copies of all proposed alternative plans, the date and names of sponsoring legislators for

each proposed alternative plan, and the names of legislators who voted in opposition to each of the final bills and to each of the proposed alternatives).

As you know, the Attorney General has a 60-day period to consider enactments submitted pursuant to Section 5. As is provided in Section 51.18(a) of the Procedures for the Administration of Section 5 of the Voting Rights Act of 1965, the 60-day period will not commence until the above-requested information, completing your submission, is received by the Department.

If we can assist you in any way in gathering this additional information or should you wish to discuss any questions raised by this letter, please do not hesitate to call on me or my staff.

Sincerely,

/s/ DAVID L. NORMAN

DAVID L. NORMAN
Assistant Attorney General
Civil Rights Division

[STIPULATION EXHIBIT E; R. 323]

THE DEPARTMENT OF LAW
STATE OF GEORGIA
ATLANTA
30334

ARTHUR K. BOLTON
ATTORNEY GENERAL

132 STATE JUDICIAL BUILDING
TELEPHONE 656-3300

Mr. David Norman
Assistant Attorney General
Civil Rights Division
Department of Justice
Washington, D. C. 20530

Dear Mr. Norman:

As requested, we are furnishing the additional information listed in your letter of November 19, 1971. The following is included:

1) The 1970 Census population, by race, for the 1964 (Senate), 1965 (House), 1968, and submitted (1971) State House and Senate Districts, and for the old (1964) and new (submitted) Congressional districts. For the three submitted plans, this information will be accurate since it has been figured by computer directly from the reapportionment bills which used boundaries chosen by the Bureau of the Census when drawing the new districts. The 1970 Census population, by race, for the 1964, 1965, and 1968 plans are less exact. They were calculated by drawing the district lines on a census map whenever a county was divided and then using the included census areas to calculate the racial data. The maps were carefully

drawn; however, complete accuracy would be impossible to guarantee.

It should be noted that this compilation of racial data is the first done by the computer center at the University of Georgia. It was believed that such computation was in violation of the contract made by the General Assembly with the Reapportionment Project at the University of Georgia. However, at the direction of the Speaker of the House of Representatives, the figures have been calculated in order to expedite approval of Georgia's three submitted plans. (A letter from Dr. Delmer Dunn of the Political Science Department is attached to the computations of the racial data).

2) 1970 Census maps for those counties outside metropolitan areas which were split by the submitted reapportionment bills. These were drawn on maps showing census county divisions if the split were along those lines or on maps showing enumeration districts where such detail is required.

3) Maps showing the precise district boundaries for each Georgia Senate or House District which divided a county in the 1968 reapportionment plan. (Some of these boundaries remained unchanged from 1964 or 1965 to 1968).

4) Statewide maps showing the Georgia Senate and House Districts in the 1964 and 1965 reapportionment and maps showing precise boundaries for those counties split by the 1964 and 1965 plans. (Also included is a copy of the 1964 and 1965 legislation establishing the Senate and House Districts).

5) A history, for the last two elections, of every primary or general election contest for the Senate, House or

U. S. Congress in which there were one or more black candidates running. As is explained in that history, the list is not official but was prepared with the assistance of the staff of a knowledgeable State legislator.

6) A book prepared by the Secretary of State listing the names and home addresses of State legislators with race designated. A list of U. S. Congressmen from Georgia and their home addresses is also included.

7) A legislative history of each submitted reapportionment plan. To prepare this history, excerpts from the House and Senate Journals have been copied. The excerpts include each day during the Special Session concerned with reapportionment. Included are all proposed bills voted on by the Senate or House, along with the record of the roll call vote.

Very truly yours,

ARTHUR K. BOLTON
Attorney General

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

Transcript of proceedings [R. 373] had before the Honorable Griffin B. Bell, Circuit Court of Appeals Judge, Honorable William C. O'Kelley, United States District Judge, and Richard C. Freeman, United States District Judge, in Atlanta, Fulton County, Georgia, on April 14 and April 18, 1972 in the above-styled action.

The parties in the District Court waived the transcription of the hearings by a reporter. In the absence of an official transcript, this document has been prepared from the recollections of the parties pursuant to Rule 10(c) of the Federal Rules of Appellate Procedure. The document represents a selective paraphasing of relevant parts of the roughly six hours of hearings and is not an attempt at a complete "transcript".

APPEARANCES OF COUNSEL:

For the Plaintiff:

James P. Turner, Deputy Assistant Attorney General Department of Justice

Harry C. Piper, III, Attorney, Department of Justice

John W. Stokes, Jr., United States Attorney

For the Defendants:

Harold N. Hill, Jr., Executive Assistant Attorney General

Robert J. Castellani, Assistant Attorney General

Dorothy Y. Kirkley, Assistant Attorney General, State of Georgia

[T. 2] (Atlanta, Georgia; Friday, April 14, 1972, in open court, commencing at 3:00 p.m.)

* * *

Following the introduction of Mr. Turner and Mr. Piper, the Court noted that a pre-trial conference had been held previously at which time all parties, through their attorneys, had agreed to the dismissal of the political party defendants. An order dismissing such defendants was tendered to the Court and signed. Attorney J. Robert Cooper presented to the Court a motion for leave to file a brief for Jimmy R. Jones, Howard Kaylor, and J. T. Frye as *amicus curiae*, with regard to District 4 in northeast Georgia. There being no objection from the Court or the parties, the Court granted leave to file the brief at the next hearing in the case.

MR. TURNER (Attorney for the plaintiff): This suit was brought by the United States to enforce the Voting Rights Act of 1965, and, in particular, to enforce Section 5 of that Act. The facts of the case are not disputed by the parties and no witnesses will be called.

Last fall the Georgia legislature, responding to 1970 Census data and this Court's directive in *Toombs* v. *Fortson*, reapportioned its Congressional and State House and Senate Districts.

[T. 3] Section 5 of the Voting Rights Act prohibits the implementation of any new legislative act in Georgia dealing with voting procedures until those new procedures have received favorable review under Section 5 either from the Attorney General or from the United States District Court for the District of Columbia. Over 150 such submissions have been received by the Justice Department from Georgia since the enactment of the Voting Rights

Act of 1965, and the Department objected to 17 of them (in whole or in part), or a little over 10 percent.

Recognizing the duty to obtain Section 5 clearance, the Georgia Attorney General in 1971 and 1972 submitted the Congressional, Senate and House apportionment acts to the Justice Department. An objection was interposed to the boundary between the Fifth and Sixth Congressional Districts; this boundary was changed by the General Assembly and the resubmitted Congressional plan was approved by the Department. Two Senate Districts were objected to, changed by the General Assembly, and later approved. The submitted October 19, 1971, House plan was objected to on the ground that its multi-member districts, as combined with other parts of the State's election procedure (numbered posts and the majority-win [runoff] requirement), tended unnecessarily to [T. 4] dilute black voting strength in the state. The legislature also took up this objection, and dealt with some of the problems raised. (Some districts in the so-called "black belt" area of east-central Georgia were changed, and the number of multi-member districts was reduced from 49 to 31). But apparently the legislature concluded it would do no more, since it passed a resolution saying that it had done all it was going to do. Thirty-two multi-member districts remained in the plan, as well as the numbered post provision and the majority requirement. This second House plan was also submitted to the Attorney General, on March 15, 1972, and was also objected to, on March 24, 1972.

The March 9 resolution, in effect, announced the legislature's unequivocal intention to implement the March 9,

1972, reapportionment plan in the upcoming 1972 elections.

THE COURT (Judge Bell): And invoked the remedial power of the Federal Court.

MR. TURNER: Yes, Your Honor, and invoked the remedial power of the Court. This suit was filed to enjoin the State's violation of the Voting Rights Act.

THE COURT (Judge Bell): We are not going to let you tear up Georgia's system of government. There are some counties in which there are no Negroes. Does the Attorney General object to those?

[T. 5] MR. TURNER: There are some multi-member districts in which the minority population is very small.

THE COURT (Judge Bell): You don't object to those, do you? Which ones are they?

MR. TURNER: I do not know them by number. I am sure that counsel can agree on some of them.

Your Honor, I am perfectly agreeable to discussing the precise areas where we feel the plan is objectionable under the Act. However, Mr. Hill has challenged the legality of the objection itself on several grounds and it might be more orderly for the Court to hear from him on these legal points. If he is upheld as to these points there would be, of course, no occasion to discuss specific relief.

THE COURT (Judge Bell): Maybe we should hear from Mr. Hill now.

Mr. Hill, attorney for defendants, introduced the Stip-

ulation of the parties and listed the four defenses of the State.

THE COURT (Judge Bell): Now Mr. Hill, we will listen to your arguments about the unconstitutionality of Section 5, but I think that issue has been settled by the Supreme Court in *South Carolina* v. *Katzenbach*. Many people in the South don't like Section 5, and every time the Attorney General objects to a new voting procedure, we get arguments that Section 5 is unconstitutional. You [T. 5A] had Justice Black on your side, but I'm afraid the issue has been pretty well settled.

MR. HILL: *Katzenbach* did not consider whether Section 5 is constitutional if applied to reapportionment, Your Honor.

Mr. Hill pointed out that multi-member districts were used in Georgia as early as the Constitution of 1877, that post designation by naming the incumbent began as local legislation as early as 1925 and was enacted as general law in 1953, and that the majority (runoff) requirement was applicable in primaries as [T. 6] early as 1962 and was made applicable in primaries and general elections in the 1964 Election Code enacted in the summer of 1964.

Mr. Hill pointed out that Glynn County had been a two man multi-member district in the reapportionment of 1961, a two man district in the reapportionment of 1965, a two man district in 1967 and again in 1968, and a two man district in 1971 and 1972.

THE COURT (Judge O'Kelley): Mr. Hill, were there any districts in the House plan which were changed from single-member districts to multi-member districts?

MR. HILL: Yes, Your Honor, there undoubtedly were such districts.

Mr. Hill argued the four points enumerated in the State's Trial Memorandum, citing in addition *Bauers* v. *Heisell*, 361 F. 2d 581 (C.A. 3, 1966), and *United States* v. *Downey*, 195 F. Supp. 581 (S.D. Ill., 1961).

THE COURT (Judge O'Kelley): Now, on the sixty-days issue. The Attorney General's objection was more than sixty days after receipt of the initial information in November, but it was less than sixty days after the requested additional information was received in January, is that correct?

MR. HILL: Yes, Your Honor, that is correct.

[T. 7] THE COURT (Judge O'Kelley): If the Attorney General were unable to toll the running of the sixty-days to get information he needed to make his decision under Section 5, couldn't he just object to a submission before the first sixty days ran out, and maintain that objection at least until the additional needed information were forthcoming?

MR. HILL: Your Honor, we recognize that any victory by us on the sixty-days issue would be short-lived.

MR. TURNER: If it please the Court, I should like to respond to some of the points raised by Mr. Hill.

I think it is quite clear after the Supreme Court's decisions in *Allen* v. *State Board of Elections* and *Perkins* v. *Matthews* that a statewide reapportionment would be subject to the requirement of Section 5 review. The Court in the *Allen* case, 393 U.S. at page 566 stated: "The legislative history on the whole supports the view that Con-

gress intended to reach any state enactment which altered the election law of a covered State in even a minor way." Later the *Allen* court at page 568 of the opinion stated that Congress intended that "all changes, no matter how small, be subjected to Section 5 scrutiny." Certainly a reapportionment of the whole state of Georgia would come within this language.

[T. 8] On the issue of whether there has been a change from November 1, 1964—reapportionment consists of the legislature evaluating every district in the state. Some districts may come out the same, and some may differ; new systems may be used, and new groupings may be made in response to the new census data and relevant new court opinions. Each reapportionment act at issue here repealed the entire existing reapportionment plan and then set out the new plan. Georgia's House plans for the first time abandoned the sanctity of county boundaries, and contained a mixture of floating representatives, and multi- and single-member districts. Most districts have different boundaries than they did before, but a few are the same.

The statutory language of Section 5 itself indicates that the Attorney General is not merely evaluating the change. The change is the occasion for an evaluation of the new voting procedure under the current law and facts. If a voting procedure is different from that in force or effect on November 1, 1964, the question for the Attorney General is whether [quoting from Section 5] "such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color . . . ." The question is whether the new voting procedure is or is not discriminatory; not whether it is or is not more discriminatory than the old one. The Supreme

Court in *South Carolina* v. *Katzenbach*, 383 U.S. [T. 9] at page 315 and 316, described the operation of Section 5 as "the suspension of all new voting regulations pending review by federal authorities to determine whether their use would perpetuate voting discrimination."

On the issue of what finding must be made by the Attorney General as a basis for his objection, we believe it is clear from the legislative history, from the statutory structure of Section 5, and from the Supreme Court's interpretation of Section 5 in the Allen case, that the Attorney General is acting, in effect, as a surrogate for the District Court for the District of Columbia when he passes on Section 5 submissions. If that is so, the burden of proof should not be different just because the state chooses to go through the Attorney General instead of through the District Court for the District of Columbia. We submit, therefore, that our language in the objection letter to the State, that we were unable to conclude that the plan was not discriminatory, was a sufficient basis for objection. We said all we believed we had to say.

THE COURT (Judge Bell): Do you usually use such language in your objection letters, as a matter of course?

MR. TURNER: We have not always used such language Your Honor, but we use it quite often.

[T. 10] THE COURT (Judge Bell): It might be just a politic way of phrasing your objection. It might be easier to tell somebody you couldn't conclude that he was not discriminating, rather than to tell him outright that he was discriminating. But we need to know which districts you are talking about. We are still in the dark about that. What evidence is there of discrimination in the reapportionment plans?

MR. TURNER: It is our position, Your Honor, that the United States does not have to prove discrimination. I think the Supreme Court has made that quite clear in the *Allen* and *Perkins* decisions. However, if your Honor wishes, Mr. Piper can pinpoint some of the grounds for our objection.

MR. HILL: I do not want to give up any rights of our clients, but neither do I want to lead the Court into error. It is my understanding of the law that the Justice Department is not required to prove discrimination.

[The Court then took a fifteen-minute recess.]

THE COURT (Judge Bell): I think we have to realize that Congress was angry when it passed the Voting Rights Act of 1965. It was right after the experiences in Selma, Alabama, and they gave the Attorney General broad powers and unfettered discretion in reviewing new voting regulations. We just have to put blinders on and see whether the Attorney General's objection was precedurally valid.

[T. 11] THE COURT (Judge Freeman): We have had sufficient discussion on most of these points, but we need to hear some specific evidence as to whether there has been a change. How is the new reapportionment plan different from the preceeding ones?

MR. TURNER: Mr. Piper can pinpoint the changes, Your Honor, and we would also like to clarify some other points.

MR. PIPER: May it please the Court, I would first like to clarify one point that there may have been some confusion about earlier. The United States does not con-

test that there was a majority-win, or runoff, provision in the Georgia Election Code as of November 1, 1964. We also do not contest that in 1964 a candidate had to qualify for a particular post by naming the incumbent he would run against. We had suggested removing the post provision and majority requirement as a way of alleviating our real objection, which was to the multi-member districts in the submitted plan.

There were certainly some multi-member districts in 1964, but the submitted multi-member districts were different ones—that is, their boundaries were largely different, or there are a different number of representatives to be elected from them. Mr. Hill has conceded that there have been some changes from single-member districts to multi-member districts, [T. 12] and I don't think he would contest that many district boundaries have changed. For example, the latest reapportionment plans for the first time in Georgia's history have a widespread breaking of county boundaries. In the 1971 plan, 31 of the 49 multi-member districts, and 21 of the 56 single-member districts, break county boundaries. In the 1972 plan, 22 of the 32 multi-member districts, and 37 of the 96 single-member districts, break county boundaries. At least as to these districts, the boundaries are by definition different from previous plans.

I might say a word here about the nature of this action and the relief we are seeking. We realize it is difficult for a Judge to grant relief in a case when he doesn't know the basis for the Attorney General's finding of discrimination. I know it would be difficult for me if I were a Judge. But we have to live with Section 5 the way it was written by Congress, and the way it has been interpreted by the Supreme Court. This is not a Fifteenth Amendment lawsuit,

and we are not here to prove discrimination. It is our contention that if you find in our favor on the four defenses which have been raised by the State, then neither of the House reapportionment plans which have been objected to by the Justice Department can be used by the State and they should be enjoined from doing so.

The State could then either go back to the 1968 court-approved plan, or a new plan could be drawn up to meet the Attorney General's objections. Now, I think we all agree the 1968 plan is seriously malapportioned according to 1970 census data . . .

[T. 13] THE COURT (Judge Bell): Maybe we should ask Mr. Hill whether they would want to go back to the 1968 plan. I believe the General Assembly was under a court order to reapportion themselves anyway. I was on the panel in the 1968 case. The legislature was under a court order to reapportion, were they not, Mr. Hill?

MR. HILL: Yes, Your Honor, that was in the case of *Toombs* v. *Fortson*, to which we have alluded earlier. The General Assembly knew it had to reapportion itself after the 1970 census material became available. The 1968 plan had become outdated.

THE COURT (Judge Bell): Well, you couldn't use that plan anyway, because the legislature was under the court order to change it.

MR. PIPER: Your Honor, the relief we are seeking in this case is somewhat unusual. In the normal Section 5 case, we would simply ask that the legislature draw up a new plan and submit it to the Attorney General or the United States District Court for the District of Columbia for approval. But here, plans have been submitted twice already and we have failed to get a satisfactory plan. We

have asked that the new plan be submitted to this Court, or that the Court draw a new plan itself. Because of the time element, we couldn't keep having plans go back and forth between Georgia and Washington like ping-pong balls. We wanted to have a plan worked out right here in this proceeding.

[T. 14] THE COURT (Judge Bell): How do we know the Justice Department wouldn't insist on reviewing under Section 5 any plan which we might develop here, if you were still dissatisfied with it?

MR. PIPER: We would not insist on such a review after this proceeding, Your Honor. That is why we filed this lawsuit—to get a final plan. We will make any comments or objections we may have within the confines of this proceeding.

MR. TURNER: Your Honor, I want to assure the Court unequivocally that the Justice Department has no intention of trying to review any plan coming out of this Court under Section 5. I am not sure we could anyway, in light of *Connor* v. *Johnson*, in which the Supreme Court said, "A decree of the United States District Court is not within reach of Section 5 of the Voting Rights Act."

THE COURT (Judge Bell): Mr. Hill, assuming that the Court overrules your defenses, what about relief? Does the General Assembly want to reapportion itself or does it want the Court to do it?

MR. HILL: May it please the Court, I hate to discuss the surgery before it has been decided that the operation is necessary. However, subject to the four defenses, the General Assembly has always responded to this Court's orders. I feel sure they would rather do it themselves.

[T. 15] MR. GEORGE L. SMITH (Speaker of the Georgia House of Representatives): May I be heard, Your Honor? The House worked hard on reapportionment and we did a good job. Or at least we thought we did. If it has to be done again, we would like to try to do it. But we would need guidelines from the Court. It can't be done without guidelines.

THE COURT (Judge Bell): The United States has indicated it does not object to all multi-member districts. Mr. Turner, please consult with Mr. Hill about those districts.

MR. TURNER: Your Honor, we are willing to specify which multi-member districts have cognizable racial minorities whose voting rights, in our view, appear to be diluted by the combination of multi-member districts, the majority requirement, and the numbered post provision. However, we would prefer not to get into the business of drawing lines and forming particular districts.

THE COURT (Judge Bell): Very well, we will reconvene in my chambers, my library, on Tuesday, April 18, at 3:00 p.m. We will now take up the case against the Senate reapportionment plan.

[T. 16] (Atlanta, Georgia, Tuesday, April 18, 1972, commencing at 3:00 P.M.)

THE COURT (Judge Bell): Because of the number of interested spectators, we are in the court room but we will proceed as if we were in chambers. Mr. Hill, we are going to overrule the State's defenses. Our decision will be written tomorrow. Have you met with the Justice Department attorneys?

MR. TURNER: We have consulted together, Your Honor. I would like to file our Interim Report to the Court. As you will see, we have represented ten multi-member districts as not containing cognizable racial minorities, and we will not object if they are left in the plan to be developed. Each has a non-white population of under 10%.

THE COURT (Judge Bell): District number 4 is in that group. We have an amicus brief asking that it be made into single-member districts. We had a motion to intervene as to district number 56 in DeKalb County but I understand it has been withdrawn and that a separate suit will be filed as to it.

MR. TURNER: Six multi-member districts contain larger non-white populations, but we represent that they are so diffused that we find no significant dilution of non-white voting strength. We will not object to them remaining multi-member districts.

[T. 17] As to Fulton County, there are 21 single-member districts and 3 "floating representatives." Because of the difficulty of redistricting Fulton County for this year's elections, and because we have received no real complaints on the present districts there, we have included Fulton County with the districts where we see no significant dilution of minority voting strength. That leaves 15 multi-member districts to which we maintain our objection and which we feel should be subdivided according to the guidelines we have set out in our Report.

THE COURT (Judge Bell): Why don't you show us where these 15 districts are.

MR. TURNER: Mr. Piper can show you where they are on the map.

MR. PIPER: [Whereupon Mr. Piper identified each of the 15 multi-member districts to which the Justice Department maintained its objection, by reading off the particular counties involved and pointing them out on the map included in the record as Stipulation Exhibit F.]

THE COURT (Judge Bell): Now, on the other districts, to which you are not maintaining, as I take it, your objection on racial grounds. You suggest that the Court may wish to consider whether multi-member districts should be allowed to stand under the Equal Protection Clause when there are single-member districts in other, "similarly situated" areas. What do you mean by "similarly situated"?

[T. 18] MR. PIPER: Well, Your Honor, I would think Georgia's large metropolitan areas would be "similarly situated." For example, why should there be all single-member districts in the Savannah area, but a large 6-member district in the Macon area? The District Court in the Texas case, *Graves* v. *Barnes*, considered the Houston area, which had all single-member districts, to be similarly situated with the San Antonio (Bexar County) and Dallas areas, which had large multi-member districts. There would also be more rural areas of Georgia which would be similarly situated. There is one good example up here in northeast Georgia [pointing to map], which I believe is the subject of the *amicus* brief which has been filed in this case. District 4 is a 2-member district stretching all the way from Fannin County on the west to Rabun County on the east. Side by side with District 4, and just to the south of it, is District 11, which is a single-member district comprising Habersham County and part of White County. Certainly districts which are side by side like that would be similarly situated.

THE COURT (Judge Bell): Isn't it true, Mr. Piper, that our state and local governments are supposed to be free to experiment, that they are laboratories for testing out new forms of democracy? We have many [T. 19] different areas in the State of Georgia. Maybe they are trying out something new up there in the mountains of north Georgia. Give me your best argument on why we should consider eliminating these other multi-member districts.

MR. PIPER: Your Honor, I agree that the state and local governments should be laboratories for democracy, so long as they have a rational basis under the Equal Protection Clause for what they are doing. There just doesn't seem to be any consistently applied rational basis for these Georgia plans. There are single-member districts, multi-member districts, and floating representatives scattered all over the place, with no apparent rhyme or reason. Also, as the Court mentioned in the Texas case, there may be discrimination against poor candidates in the multi-member districts. Generally speaking, it costs more to campaign in a multi-member district. You have to cover a wider area and reach more people.

MR. TURNER: Your Honor, we mentioned the Fourteenth Amendment in our Interim Report only as a service to the Court and the parties, so that we would not come out with a plan which might be vulnerable to attack on non-racial grounds. Our principal concern, of course, is with preventing any adverse racial effects in the plan.

[T. 20] THE COURT (Judge Bell): Mr. Hill, what advice do you have for your clients. Many of them are present in court.

MR. HILL: Your Honor, there are many lawyers in the General Assembly, there are many conflicting interests. I do not feel that I can tell them what they have to do. I do object however particularly to the last paragraph of Section 5 of the government's Interim Report. *Dunston* v. *Scott* did not outlaw multi-member districts. It outlawed the anti-single shot law in effect in some North Carolina counties and also the numbered seat law in effect in some multi-member districts. This was done on equal protection grounds, not the 15th Amendment. If the numbered seat law had been in effect in all multi-member districts, it appears it would not have been invalidated.

In *Graves* v. *Barnes*, the Texas decision cited by the government, it appears that only one judge concurred in Section two of the per curiam opinion, Judge Justice. The other two judges did not agree with that section of the opinion regarding multi-member districts. The Dallas County situation in section three of the opinion is distinct. They had a "jay bird" committee, the D.C.R.G., controlling the elections in Dallas. The Court also found actual discrimination in Bexar County, San Antonio, as to Mexican-Americans. I believe my understanding of the [T. 21] Texas decision is confirmed by Mr. Justice Powell's analysis of the case in denying a stay as to Dallas and Bexar Counties.

Last week, ten days ago now, the Court in *Twiggs* v. *West* upheld numbered seats in multi-member districts in the South Carolina Senate plan. South Carolina has majority runoffs in its primaries.

Moreover, this last paragraph of Section 5 of the government's Report is contrary to *Whitcomb* v. *Chavis*. In

that case the Supreme Court said that the challenger must "carry the burden of proof that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial or political elements."

THE COURT (Judge Bell): Mr. Turner, the Court agrees with you as to 14 of the 15 multi-member districts listed in paragraph Four of your Interim Report. We are not sure whether we agree as to District 128, Glynn County. It has been a 2-man district as long as I can remember. We will require that these 14 districts be subdivided. Mr. Speaker and Mr. Williams [Chairman of the House Reapportionment Committee], you should consider subdividing Glynn County anyway, at least on the other, not necessarily racial, grounds we have discussed. There will be a hearing on the separate lawsuit as to District 56 in DeKalb County at a later date. You could make that lawsuit moot by subdividing District 56. The Court has not ruled on the issues raised in the *amicus* brief as to [T. 22] District 4 in northeast Georgia. The General Assembly can risk leaving District 4 unchanged if it wants, but our ruling could go against them. You can moot this problem also by subdividing the district.

MR. SPEAKER SMITH: Your Honor, should we use the guidelines suggested by the United States in their Interim Report to fashion our new districts?

THE COURT (Judge Bell): Well, Mr. Speaker, we are not ordering these particular guidelines to be used. But if you want to get this reapportionment over with, it would be wise to work with the Justice Department and try to do what they want.

MR. TURNER: May it please the Court, I would like to address the Glynn County situation. If there has been

a discriminatory racial effect on voting in Glynn County for many years, that is no reason for allowing the discrimination to continue. As we have stated earlier, the legislature repealed the entire existing reapportionment plan before it set to work on the new plans which are the subject of this lawsuit. The Glynn County district is part of the whole new reapportionment plan, and the legislature had an affirmative choice as to what district to draw there, just as it made a choice in every other part of the state. Glynn County is one part of the new reapportionment plan which, as a whole, is different from the plan in force or effect in 1964.

[T. 23] THE COURT (Judge Bell): Yes, Mr. Turner, we understand your arguments on that. Judge Freeman agrees with you, but we just have not made up our minds yet.

MR. TURNER: Judge Freeman is very perceptive. [Laughter.]

THE COURT (Judge Bell): The State should be prepared with a rational basis, not a compelling interest, but a rational basis, for any multi-member districts which it leaves in the new plan to be developed. To the extent that you subdivide some of the 17 multi-member districts not objected to by the Justice Department, the question would be moot. It seems to me a little risky to have a special session and not take care of all of this. To be absolutely safe you wouldn't have any multi-member districts.

MR. SPEAKER SMITH: Your Honor, the General Assembly of Georgia has never failed to obey a court order, and we will not do so now. We can have a special session next week, starting Monday, April 24. I cannot

speak for the Governor, but I am confident that we can have a special session right away. But I have a request for the Court. We will want to get a ruling on our new plan as soon as possible, in case we would have any more work to do on it. Could we have a ruling on it right after the special session next week?

[T. 24] THE COURT (Judge Bell, after conferring with J. O'Kelley and J. Freeman): Yes, Mr. Speaker, we could set our next hearing for Wednesday, May 3, at 3:00 p.m. [Mr. Hill and Mr. Turner agreed to that date and time.]

MR. SPEAKER SMITH: Also, Your Honor, I wonder if it would be possible for representatives from the Justice Department to come down and work with us on this.

MR. TURNER: Your Honor, Mr. Piper and I would be happy to make ourselves available for this purpose.

MR. SPEAKER SMITH: Could you come down to Atlanta next Tuesday? We would have the preliminary work done by then.

MR. TURNER: That would be fine. We would be happy to come down to Atlanta on Tuesday.

THE COURT (Judge Bell): All right, we will have our opinion prepared and get it out to you tomorrow. We will set the next hearing for 3:00 on Wednesday, May 3. We will now take up the Senate case.

[The foregoing transcript prepared pursuant to Rule 10(c), F.R.A.P.]

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IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Caption omitted in printing]

INTERIM REPORT TO THE COURT

[Filed April 18, 1972; R. 337]

1. Pursuant to the request of the Court, this report has been prepared following consultations between attorneys for the United States and for the State of Georgia. The report is based on these consultations and on 1970 census population data, by race, for the areas in question.

2. The plaintiff United States represents that the following ten multi-member districts (containing 27 members of the 180-member House) in Georgia's March 9, 1972 House reapportionment plan do not contain cognizable racial minorities within the meaning of the law. (Each has a non-white population percentage of less than 10 percent.)

1972 District #	(1971 District #)	No. Members	Population (1970 Census) Non-white	(%)	Total
1	(1)	2	2397	(4.68)	51,206
4	(4)	2	677	(1.32)	51,288
6	(6)	2	2346	(4.65)	50,496
8	(8)	3	5822	(7.60)	76,602
9	(9)	3	6174	(8.09)	76,333
19	(16)	3	7067	(6.91)	102,341
20	(17)	3	1618	(1.58)	102,170
21	(18)	2	8685	(4.25)	204,511
56	(46)	3	984	(1.28)	76,784
68	(55)	4	4765	(4.76)	100,000

The United States Attorney General will not object under Section 5 of the Voting Rights Act of 1965 if the above-designated multi-member districts remain in the

new House reapportionment plan to be formulated by the General Assembly pursuant to the decree of this Court.

3. The United States further agrees that although the following six multi-member districts (containing 13 members of the 180-member House) contain larger non-white populations which probably constitute cognizable racial minorities, the non-white population is so diffused that we conclude there is no significant dilution of voting strength attributable to multi-member districting:

1972 District #	(1971 District #)	No. Members	Population (1970 Census) Non-white	(%)	Total
13	(12)	3	18,426	(24.11)	76,416
64	(51)	2	8,437	(16.47)	51,236
67	(54)	2	12,898	(25.42)	50,746
116	(96)	2	11,910	(23.10)	51,563
123	(101)	2	13,163	(25.82)	50,973
127	(104)	2	12,134	(23.34)	51,977

Also, because of the relative complexity of further redistricting Fulton County for the 1972 elections, and because of the apparently minimal adverse racial effect from the existing Districts there, the United States will not object under Section 5 to leaving those districts (including District 43—the three at-large Fulton County members) unchanged in the new plan to be developed.

4. The remaining fifteen multi-member districts (containing 41 members of the 180-member House), in the opinion of the United States, have significant and cognizable nonwhite population concentrations whose inclusion in a multi-member district, in the context of numerical posts and a majority-win (runoff) requirement, would occasion a dilution or abridgment of voting rights on account of race or color. The United States therefore re-

quests the Court to direct the General Assembly, pursuant to the proposed guidelines set out below, to subdivide into single-member districts the following fifteen multi-member districts for use in the 1972 (and future) elections:

1972 District #	(1971 District #)	No. Members	Population (1970 Census) Non-white	(%)	Total
62	(49)	3	14,714	(19.05)	77,225
65	(52)	3	24,851	(31.88)	77,957
74	(61)	2	17,939	(35.19)	50,974
76	(78)	2	20,096	(40.67)	49,408
77	(64)	2	23,206	(45.08)	51,477
85	(71)	2	8,466	(11.19)	75,672
86	(72)	2	29,441	(37.84)	77,806
87	(73)	2	37,910	(24.70)	153,478
89	(75)	6	53,524	(35.30)	151,640
102	(82)	3	23,474	(30.56)	76,806
114	(94)	4	37,495	(36.30)	103,301
115	(95)	3	28,935	(38.24)	75,669
122	(100)	2	16,724	(32.69)	51,156
124	(102)	3	24,494	(32.31)	75,806
128	(105)	2	12,534	(24.81)	50,528

5. The existing multi-member districts can be internally subdivided, with no "domino effect" on other districts. By definition, each of the multi-member districts contains the right number of people needed for subdivision into single-member districts each having an "ideal population" from a one-man, one-vote standpoint.

In subdividing the multi-member districts, the General Assembly should employ the following guidelines:

(a) Single-member districts should be utilized exclusively.

(b) The new districts should each be compact and contiguous.

(c) The racial effect of each subdivision should be affirmatively considered; that is, Fifteenth Amendment rights should be affirmatively protected.

(d) Areas of nonwhite population concentration should not be unnecessarily divided between different districts.

(e) The 1970 Census population, by race, shall be calculated for each proposed new single-member district and shall be furnished by the defendants with the proposed new plan for the use of the Court and the parties in reviewing the new plan.

In fashioning guidelines for the General Assembly, the Court should consider recent cases dealing with the (not necessarily racial) requirements of the Fourteenth Amendment. Specifically, the Court should consider whether leaving multi-member districts in some areas, but not in other, similarly-situated areas, would meet the requirements of the Equal Protection Clause in the absence of a rational justification by the State for such differing treatment. See *Dunston* v. *Scott*, No. 2666-Civil (E.D.N.C., Jan. 10, 1972), and *Graves* v. *Barnes*, No. A-71-CA 142 (W.D. Texas, Jan. 1972). Perhaps the amicus brief to be filed by Jimmy R. Jones, Howard Kaylor, and J. T. Fry will be of assistance to the Court in this connection.

If the Court includes such Fourteenth Amendment guidelines to the legislature, any further subdivision of multi-member districts which might then be indicated

could be accomplished either before or after the 1972 elections.

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ATTORNEYS FOR THE
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OPINION AND ORDER OF THE DISTRICT COURT:

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE NO. 16373

UNITED STATES OF AMERICA
V.
THE STATE OF GEORGIA, ET AL.

[Filed April 19, 1972; R. 353]

BEFORE: BELL, Circuit Judge; O'KELLEY, District Judge; and FREEMAN, District Judge

PER CURIAM

ORDER

The Acting Attorney General of the United States brings this action under Section 12(d) of the Voting Rights Act of 1965 [42 U.S.C. §1973j(d)] alleging a violation of Section 5 of the Act [42 U.S,C. §1973c]. Section 5 requires that either the Attorney General or the United States District Court for the District of Columbia approved the enactment of "any voting qualification or prerequisite to voting or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964." The Attorney General here alleges that the 1972 Georgia House reapportionment plan[1] was rejected by the Attorney General

[1] 1972 Act No. 877.

under Section 5 within the required 60-day statutory period and asks that this three-judge court, convened pursuant to 28 U.S.C. §2284, enjoin the State from proceeding to hold elections under the current reapportionment plan.

In 1971, the State of Georgia reapportioned its Congressional, State Senate and State House districts and presented its proposed plans to the Attorney General for Section 5 review. The Attorney General requested additional information as to all three plans and such information was furnished by the State. Thereafter, objections were made by the Attorney General as to portions of each of the plans. As a result, new Congressional and Senatorial plans were subsequently adopted by the General Assembly and were approved by the Attorney General. Although the State of Georgia adopted a new House plan in response to the Attorney General's first objection, that plan failed to eliminate the features of the first plan [i.e., multi-member districts, numerical posts and majority runoffs] to which the Attorney General had objected. For that reason, the Attorney General rejected this second House plan and subsequently, filed this action.

The legislative history of the Voting Rights Act does not clearly indicate that Congress intended Section 5 to apply to reapportionment acts. In view of *Allen v. State Board of Elections*, 393 U.S. 544, 22 L.Ed.2d 1, 89 S.Ct. 817 (1969) and *Perkins v. Matthews*, 400 U.S. 379, 27 L.Ed.2d 476, 91 S.Ct. 431 (1971), this Court holds that Section 5 is applicable to such plans. Moreover, this reapportionment plan is subject to Section 5 because the plan constitutes a change from prior Georgia procedures in that it redraws district lines and in some instances, re-

places single-member districts with multi-member districts. The State's contention to the contrary is not well-founded.

Therefore, under the Voting Rights Act, the sole question before this Court is whether this plan, having been presented to the Attorney General for review, was rejected by him within 60 days. If so, this Court, without determining the merits of the State's proposed plan, must enjoin the State from operating under it.

In looking at the timetable of events in this case, we find that the Attorney General objected to the State's plan within the requisite 60 days. The first House reapportionment plan was submitted to the Attorney General on November 5, 1971. By letter dated November 19, 1971, the Attorney General requested further information from the State to aid in his Section 5 review. At that time, the Attorney General advised the State that the 60-day period for objection would commence running when the additional information was received by the Justice Department. That additional information was received on January 6, 1972 (more than 60 days after the State first submitted its plan), and the United States made its objection to the plan on March 3, 1972. Since the Attorney General's objection of March 3, 1972, was made within 60 days of his receipt of the additional information, we find that there was compliance with the 60-day time limit by the Attorney General. Likewise, the Attorney General's March 24, 1972 objection to the second House reapportionment plan dated March 9, 1972 was within the 60-day period. The Court will not allow the State to withhold additional information sought by the Attorney General until after the 60-day period has elapsed and thereafter contend that the Attorney General failed to object within the statutory period.

The 1971 and 1972 plans were disapproved by the Acting United States Attorney General. The State cannot revert to its previous apportionment statutes[2] since this Court has already declared that the State is malapportioned thereby and has ordered the State to reapportion.[3]

This Court specifically does not pass on the merits of the Georgia reapportionment plan.[4] We determine, however, that the Attorney General had jurisdiction over the matter and that within the proscription of Section 5, he disapproved Georgia's reapportionment plan. We further find that Section 5 of the Voting Rights Act is constitutional as applied.[5] Therefore, while retaining jurisdiction of this matter, the Court hereby enjoins the State of Georgia from proceeding to hold elections under the present reapportionment plan. The Speaker of the Georgia House of Representatives was present in Court and announced that the General Assembly would comply with the Court's Orders. Also, the legal aide to the Governor indicated that a Special Session of the General Assembly would be called immediately.

The Court will reconvene at 2:00 P.M. on May 3, 1972, to review any plan submitted by the State of Geor-

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[2] Ga. Laws 1968, p. 209.

[3] *Toombs v. Fortson*, 277 F.Supp. 821 (N.D. Ga. 1967).

[4] An Amicus Curiae Brief has been filed in this case making a 14th Amendment attack on the 4th district. The Acting Attorney General also points out 'Equal Protection' problems as to multi-member districts in general and a separate complaint has been filed making a 14th Amendment attack on the 56th Senatorial District in DeKalb County. The Court has also received correspondence and complaints about other districts and gerrymandering. One of these was from the Ordinary of Paulding County. This Order does not pass on these questions.

[5] Cf. *South Carolina v. Katzenbach*, 383 U.S. 301, 86 S.Ct. 803, 15 L.Ed.2d 769.

gia or in the alternative to hear argument as to such action as may be required by the Court.

IT IS SO ORDERED this 19 day of April, 1972.

[Signatures omitted in printing]

SUPREME COURT OF THE UNITED STATES

No. 72-75

Georgia et al.,

Appellants,

v.

United States

[Filed October 24, 1972]

APPEAL from the United States District Court for the Northern District of Georgia.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 16, 1972

72-75

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[illegible]R., CLERK

IN THE

Supreme Court of the United States

October Term, 1972

No.

THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and Member of the State Election Board; WILLIAM F. BLANKS, M. M. SMITH, MATTHEW PATTON, and MELBA WILLIAMS, Members of the State Election Board,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

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July, 1972

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IN THE

Supreme Court of the United States

October Term, 1972

No.

THE STATE OF GEORGIA; THE GENERAL ASSEMBLY OF THE STATE OF GEORGIA; JIMMY CARTER, Governor; BEN W. FORTSON, JR., Secretary of State and Member of the State Election Board; WILLIAM F. BLANKS, M. M. SMITH, MATTHEW PATTON, and MELBA WILLIAMS, Members of the State Election Board,

Appellants,

v.

THE UNITED STATES OF AMERICA,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

This is an appeal from the order of the United States District Court for the Northern District of Georgia, entered on April 19, 1972, enjoining the State of Georgia from holding elections under the 1972 and 1971 reapportionment acts for its House of Representatives. Appellants submit this Statement to show that the Supreme Court has jurisdiction, and that a substantial question is presented.

OPINION BELOW

The opinion of the District Court is not yet reported. A copy of the opinion is attached hereto as Appendix A.

JURISDICTION

This suit was instituted on behalf of the United States based upon Sections 5 and 12(d) of the Voting Rights Act of 1965, Pub. L. 89-110, 79 Stat. 437, 42 U.S.C. §§ 1973c and 1973j(d), to enjoin the State of Georgia and the other appellants (defendants) from holding elections pursuant to the reapportionment acts for the House of Representatives adopted by the Georgia General Assembly on March 9, 1972, and October 14, 1971.

A three-judge court was sought and convened, based upon 28 U.S.C. 2284 and Section 5 of the Voting Rights Act of 1965, 42 U.S.C. 1973c.

The injunction of the three-judge District Court was entered on April 19, 1972, and was stayed by this Court on April 21, 1972 (No. A-1106). Notice of Appeal was filed in the District Court on May 17, 1972 (Appendix C).

The jurisdiction of this Court to review that order and decision by direct appeal is conferred by 28 U.S.C. § 1253 and 28 U.S.C. § 2101(b), as well as Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c). The decision in *Allen v. State Board of Elections*, 393 U.S. 544 (1969), sustains the jurisdiction of this Court to review this case on direct appeal.

STATUTES AND REGULATIONS INVOLVED

Section 4 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973b), which provides the formula for determination of which States and political subdivisions are subject to the Act, is set forth in Appendix B hereto.

Section 5 of the Voting Rights Act of 1965, as amended (42 U.S.C. § 1973c), the statute directly involved in this appeal, provides as follows:

> "Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the second sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, and unless and until the court enters such judgment no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, prac-

tice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, except that neither the Attorney General's failure to object nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court."

The Attorney General adopted "Procedures for the Administration of Section 5 of the Voting Rights Act of 1965" which were printed in the Federal Register (Vol. 36, No. 176—Friday, September 10, 1971, pp. 18186-18190). Two provisions thereof directly involved in this appeal are as follows:

"§ 51.18 Obtaining information regarding submissions.

(a) If the submission does not satisfy the requirements of § 51.10(a), the Attorney General shall request such further information as is necessary from the submitting authority and advise the submitting authority that the 60-day period will not commence until such information is received by the Department of Justice. The request shall be made as promptly as possible after receipt of the original inadequate submission."

[The provisions of § 51.10(a), referred to in the above

quotation, are lengthy, include by reference the provisions of § 51.10(b), and both are set forth in Appendix B.]

"§ 51.19 Standard for decision concerning submissions.

Section 5, in providing for submission to the Attorney General as an alternative to seeking a declaratory judgment from the U.S. District Court for the District of Columbia, imposes on the Attorney General what is essentially a judicial function. Therefore, the burden of proof on the submitting authority is the same in submitting changes to the Attorney General as it would be in submitting changes to the District Court for the District of Columbia. The Attorney General shall base his decision on a review of material presented by the submitting authority, relevant information provided by individuals or groups, and the results of any investigation conducted by the Department of Justice. If the Attorney General is satisfied that the submitted change does not have a racially discriminatory purpose or effect, he will not object to the change and will so notify the submitting authority. If the Attorney General determines that the submitted change has a racially discriminatory purpose or effect, he will enter an objection and will so notify the submitting authority. If the evidence as to the purpose or effect of the change is conflicting, and the Attorney General is unable to resolve the conflict within the 60-day period, he shall, consistent with the above-described burden of proof applicable in the District Court, enter an objection and so notify the submitting authority."

Other pertinent provisions of the Attorney General's Procedures ("Authority", § 51.3, § 51.10, § 51.26a) are set forth in Appendix B.

QUESTIONS PRESENTED

This appeal raises four questions, all relating to Section 5 of the Voting Rights Act of 1965, and each dependent upon an affirmative answer to the preceding question or questions.

1. Is Section 5 of the Voting Rights Act applicable to State legislative reapportionment acts, and if so, is Section 5 constitutional as thus applied?

2. Does Section 5 empower the U.S. Attorney General to disapprove the use of multi-member legislative districts, in combination with designated posts and the majority (runoff) election requirement, when a State subject to Section 5 (Georgia) was using all three prior to November 1, 1964 (the effective date of Section 5); i.e. can the Attorney General disapprove an election system, in principle, when there has been no change, in principle, in such election system?

3. Does Section 5 empower the Attorney General to disapprove a State law which he does not find to be discriminatory, but about which he says: "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting"; i.e., about which the Attorney General is unable to reach a decision?

4. Does the Attorney General have the power to extend the 60 day time limit Congress placed on him in Section 5 of the Voting Rights Act of 1965?

STATEMENT OF THE CASE

Following receipt of the 1970 Census, the Georgia General Assembly, one of the defendants herein, met in extraordinary session in the fall of 1971, to reapportion its legislative and congressional districts. The 1971

reapportionment act for the Georgia House of Representatives was submitted to the United States Attorney General, with explanatory maps and data, on November 5, 1971. On November 19, 1971, the Attorney General requested additional information, which was supplied on January 6, 1972.[1]

On Friday, March 3, 1972 (approximately 120 days after the November 5 submission, appellants contend), the U.S. Attorney General objected to the combination of multi-member districts, numbered posts and majority (runoff) requirement, saying:

> "Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This objection was received by the General Assembly on Monday, March 6, at which time the legislature had only four days remaining in its 1972 regular (40 day) session. In those four days, the House of Representatives divided such multi-member districts into single member districts as it was able to (dividing 18 multi-member districts and leaving 32). It also adopted a resolution, addressed to the Attorney General, pointing out that it had not "changed" in its use of multi-member districts, designated posts, and majority (runoff) re-

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[1]The District Court stated that this additional information was "withheld" by the State until the 60-day period elapsed. As will be seen, the record is void of any evidence whatsoever that the State "withheld" the information. The United States did not even contend that it was "withheld". It took from November 19, 1971, to January 6, 1972, working Thanksgiving and during the Christmas holidays, to program the University of Georgia computer to obtain the mass of information requested by the Attorney General; e.g., "The 1970 Census population, by race, for the 1964, 1968, and submitted (1971) State House and Senate districts, and for the old (1964) and new (submitted) Congressional districts."

quirement. The amended House reapportionment act (1972) also was submitted to the Attorney General, and was objected to by him on March 24, 1972, on the ground that it continued to use multi-member districts, numbered posts and majority (runoff) requirement.

The State of Georgia commenced using multi-member districts in its House of Representatives as early as 1880 (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51). It began designating posts in multi-member districts in Fulton County in 1925 (Ga. Laws 1925, p. 205), and as more and more such local laws were enacted, a state-wide designated post law was adopted in 1953 (Ga. Laws 1953, Nov. Sess., p. 269; Ga. Code Ann. § 47-119; see also Ga. Laws 1964, Ex. Sess., p. 26 at p. 89, approved June 24, 1964). Georgia's majority (runoff) election requirement, which had commenced as to some offices as early as 1917 (Ga. Laws 1917, pp. 183-184), was made applicable to legislators in primaries in 1962, and in elections in 1964 (Ga. Laws 1962, p. 1217 at p. 1218; Ga. Laws 1964, Ex. Sess., p. 26 at pp. 174-175, approved June 24, 1964)[2].

Thus, prior to November 1, 1964, the effective date of Section 5 of the Voting Rights Act of 1965 (42 U.S.C. § 1973c), Georgia was and had been using multi-member districts, designated posts and the majority (runoff) election requirement as to its House of Representatives. The Attorney General objected to Georgia's use of an election system which has not changed.

This suit was instituted March 27, 1972, in the United

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[2]See *Bond v. Fortson*, 334 F.Supp. 1192 (N.D. Ga. 1971), aff'd 404 U.S. 930 (1971).

States District Court for the Northern District of Georgia seeking to enjoin the State from implementing its reapportionment acts of 1971 and 1972. Defendants raised four special defenses, which defenses appear as the questions presented in this appeal.

Hearing on those four questions was held on the afternoon of April 14, 1972. The court reconvened on the afternoon of April 18, announced that the State's four defenses would be overruled, called for discussion as to the relief to be granted, and received the Interim Report of the Government.[3]

In its Interim Report, the Government withdrew its objection to 17 multi-member districts it previously had objected to, retaining its objection as to 15 such districts. This corrective maneuver came too late to be acted upon by the General Assembly, which had already adjourned. Moreover, the Government volunteered that the District Court should consider requiring that all multi-member districts be subdivided, even those 17 not then objected to.

The District Court expressed the view at the April 18 hearing that if the 17 districts not then objected to by the Justice Department were subdivided, the multi-member question would be moot, and that it would be risky to have a special session of the legislature, to commence

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[3]Appellants do not consider that the United States of America, except as a legal entity, instituted this action. We do not consider that the United States Attorney General, occupied with many matters, disapproved Georgia's reapportionment plans. (He did not sign the letters of disapproval.) Thus, plaintiff-appellee will be referred to herein occasionally as the Government, and the Attorney General as the Justice Department, in accord with the facts of the case.

April 24, and not subdivide those 17 districts (Transcript, pp. 21-23).

The order of the District Court was issued on April 19, 1972. The Court did not rule on the Government's suggestion that all multi-member districts be subdivided (see Appendix A, footnote 4). It did, however, enjoin the State from conducting elections under the 1971 and '72 House of Representatives reapportionment acts. Unsure of how much would be required, the General Assembly prepared to convene in extraordinary session on April 24, 1972.

This Court granted a stay of that injunction on April 21, 1972 (No. A-1106), and the Government's motion to vacate the stay was denied on May 5, 1972.

(In a companion case, *Millican v. Fortson*, the District Court ordered reapportionment of the Georgia Senate, which order was stayed by this Court, No. A-1105, also on April 21, 1972. The Jurisdictional Statement in the appeal of that case is being filed simultaneously with the filing of this one.)

THE QUESTIONS ARE SUBSTANTIAL

1. Is Section 5 of the Voting Rights Act Applicable to Reapportionment, and if so, Is It Constitutional as Applied?

The primary purpose of this appeal is to determine whether Section 5 of the Voting Rights Act of 1965 (42 U.S.C. 1973c) is applicable to State legislative reapportionment acts, and if so, whether Section 5 is constitutional as applied. This question is of vital importance to the states covered by Section 5, Georgia, Alabama, Louisiana, Mississippi, South Carolina and

Virginia. It is also of vital importance to Arizona, California, Hawaii, Idaho, New York, North Carolina and Wyoming, which have political subdivisions subject to Section 5. The latter States could have their legislative reapportionment plans upset by failing to submit their reapportionment plans to the Justice Department (and being challenged as in *Allen v. State Board of Elections*, 393 U.S. 544), or by failing to convince the Justice Department that their reapportionment plans do not have a discriminatory racial effect on voting in the affected political subdivisions.

In *Allen v State Board of Elections*, 393 U.S. 544 (1969), this Court expressly declined to decide whether Section 5 is applicable to reapportionment, saying (393 U.S. at 569):

> "Also, the question of whether § 5 might cause problems in the implementation of reapportionment legislation is not properly before us at this time. There is no direct conflict between our interpretation of this statute and the principle involved in the reapportionment cases. The argument that some administrative problem might arise in the future does not establish that Congress intended that § 5 have a narrow scope; we leave to another case a consideration of any possible conflict."

The question properly left unanswered in *Allen* is the primary question in the case at bar.

In *Allen*, the Government took the position that the applicability of Section 5 to reapportionment need not be decided in that case and, moreover, that the Court's decision of *Allen* would not be tantamount to concluding that Section 5 did apply to reapportionment (Brief of the United States in *Fairley v. Patterson*, decided with

Allen, supra; brief pages 22, 24). Yet the Government now contends that *Allen, supra,* and *Perkins v. Matthews,* 400 U.S. 379 (1971), made Section 5 applicable to reapportionment.

Appellants submit that the legislative history of the 1965 Voting Rights Act shows that Congress did not intend that it apply to reapportionment. See *Allen, supra.* If Congressmen had thought that the Act applied to congressional redistricting, they certainly showed an unusual lack of interest in the subject.

Moreover, one of the drafters of the '65 Act, Assistant Attorney General David L. Norman, testified before a Congressional subcommittee that before *Allen* and *Perkins:* "We didn't formerly think that reapportionment as such had to be submitted, or annexation." (Hearings before the Civil Rights Oversight Committee on the Enforcement of the Voting Rights Act, pp. 5, 6, 68, 1971.) Mr. Norman's testimony demonstrates the importance of the questions presented by this appeal. He testified as follows (Ibid at 7):

> "Our experience in the enforcement of Section 5 shows a considerable increase now in the number of submissions from States and political subdivisions, which are covered by the Voting Rights Act.
>
> This is largely, I think, a consequence of the Supreme Court holdings in two very important cases, one this year and one in 1969. More and more changes are covered by Section 5, so that now, for example, matters of reapportionment, redistricting, and even matters of annexation must be submitted either to the District Court for the District of Columbia for a declaratory judgment, or in the alternative, to the Attorney General of the United States.

> That fact, coupled with the 1970 decennial census which necessitates reapportionment and redistricting almost everywhere, has led to a substantial increase in the submissions to the Attorney General."

The "administrative problems" referred to by the Court in *Allen* have arisen. There are needless conflicts and pressures between the District Courts and the Attorney General's office in the reapportionment field. A State adopts a reapportionment plan and submits it to the Justice Department. A citizen's suit is filed in the local District Court alleging either too much deviation from one man - one vote, or racial gerrymandering, or both. The plan is not effective until approved by the Justice Department. Thus the court may delay decision for 60 days (or more) to see if Justice disapproves the plan. The court is likely to want to delay decision, apprehending that if the court approves the plan and Justice disapproves it, the court will look bad. The Justice Department, on the other hand, feels some pressure to disapprove the plan for fear that if they approve it and the court then disapproves it, the Department will look bad. Yet what would happen if the court approves the plan and Justice disapproves? Is the plan in effect under *Connor v. Johnson*, 402 U.S. 690 (1971), or is the plan not in effect pursuant to *Perkins v. Matthews*, 400 U.S. 379 (1971)? The conflicts and pressures between the District Courts and the Justice Department can be avoided by this Court's decision of this case.

Reapportionment is, in the first instance, a matter for State legislatures, and secondly, a matter for the courts. *Burns v. Richardson*, 384 U.S. 73, 85 (1966). There is no room for the federal executive branch. Unlike a

court, the Attorney General cannot formulate a reapportionment plan, nor withhold relief where an election is imminent.

The inability of the Attorney General to formulate a plan, and to withhold relief until after an election, causes serious problems, which were avoided in this case only by resort to the court. As was stated to the court below by Mr. Harry Piper, Justice Department attorney, Georgia adopted two reapportionment plans, neither of which was found to be satisfactory. Mr. Piper continued, saying (Transcript, p. 13):

> "We have asked that the new plan be submitted to this Court, or that the Court draw a new plan itself. Because of the time element, we couldn't keep having plans go back and forth between Georgia and Washington like ping-pong balls."

Ping-pong may be a fine beginning point for international relations but it is undignified in our federal system. Without this suit, Georgia could still be adopting and submitting reapportionment plans, in its effort to satisfy Washington, right through the campaign and election. If litigation is the best solution, then the solution should be applied sooner rather than later. The federal courts, which are properly equipped to deal with reapportionment, should be allowed to proceed without interference from the federal executive branch.[4]

This Court has not held that reapportionment acts are subject to Section 5. Such a decision was expressly left to another case. *Allen, supra,* 393 U.S. at 569.

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[4]The simplest solution would be for the covered States to abdicate their duties and let the District Courts formulate reapportionment plans, thereby avoiding the Justice Department altogether. (*Connor v. Johnson,* 402 U.S. 690).

We respectfully submit that this case is the one. Most Section 5 cases are brought by private litigants against a State (see *Allen*, *Fairley* and *Perkins*, *supra.*). The United States is a party to this case and can explain (defend) in person its contention that Section 5 applies to reapportionment, and its procedures used in evaluating reapportionment plans under Section 5.

If Section 5 is to be applied to reapportionment, the question remains, is it constitutional as applied? The "as applied" question was not decided in *South Carolina v. Katzenbach*, 383 U.S. 301 (1966).

The facial constitutionality of the Voting Rights Act and of Section 5 was upheld in *Katzenbach*. But the selective coverage formula (Section 4) was upheld as being appropriate legislation authorized by the 15th Amendment; i.e., a rational means of attacking the problem of voter registration tests and devices found to exist in the covered states, 383 U.S. at 325, 329-331. Reapportionment is a national problem, not limited to the covered states, and the appropriate legislation and rational means tests which authorized the selective coverage formula are not applicable to national problems such as reapportionment.

Moreover, the facial validity of the prior approval requirements of Section 5 was upheld in *Katzenbach* as a means of preventing the covered states from resorting "to the extraordinary stratagem of contriving new rules" in the face of adverse court decrees (383 U.S. at 334-335). States do not reapportion as an extraordinary stratagem contrived to avoid court decrees. The opposite is true. States reapportion to comply with court decrees, not to avoid them. Almost invariably, reappor-

tionment plans are litigated, whereas the denial of an individual's right to register to vote rarely was. The reasons announced in *Katzenbach* for upholding Section 5 simply do not exist in the field of reapportionment.

Let us assume for the moment that Congress enacted a law, entitled the Reapportionment Approval Act of 1965, requiring certain covered states to submit their reapportionment acts to either the District Court in Washington or to the Justice Department for approval. Would that be appropriate legislation as authorized by the 15th Amendment? We submit that the answer clearly is "No". Yet the court below in effect has held that such an Act would be valid.

Such an Act clearly would not be "appropriate" under the 15th Amendment and clearly would violate the constitutional guarantee to the States of a Republican Form of Government, by suspending State legislative apportionment acts, pending approval, and by authorizing disapproval of such acts. Compare *Bauers v. Heisell*, 361 F.2d 581 (C.A. 3, 1966).

Whether or not Section 5 is applicable to reapportionment, and constitutional if applicable, these questions are nevertheless worthy of decision by this Court. The covered states and the other affected states are entitled, we respectfully submit, to have such questions decided by the highest authority.

2. Does Section 5 Empower the Attorney General to Disapprove an Election System Which Has Not Changed?

If Section 5 of the 1965 Voting Rights Act is applicable to reapportionment and if it is constitutional at

thus applied, then the interpretation and construction of Section 5 become critical to the thirteen covered and affected States.

The first of these questions involves the scope of review by the Justice Department.

It is clear beyond doubt that the Justice Department objected to Georgia's use of multi-member districts. Mr. Harry Piper, speaking for the Government, stated to the court below (Transcript, p. 11):

> "The United States does not contest that there was a majority-win, or runoff, provision in the Georgia Election Code as of November 1, 1964. We also do not contest that in 1964 a candidate had to qualify for a particular post by naming the incumbent he would run against. We had suggested removing the post provision and majority requirement as a way of alleviating our real objection, which was to the multi-member districts in the submitted plan."

It is equally clear that Georgia was using multi-member districts continuously from 1880 to date (Ga. Const. 1877, Art. III, Sec. III, Par. I; Ga. Laws 1880-81, p. 51), and was using both designated posts and majority election prior to November 1, 1964.

It is also clear that Section 5 requires submission only of voting laws ". . . different from that in force or effect on November 1, 1964. . . ." In other words, Section 5 suspends only "new" voting regulations. *South Carolina v. Katzenbach, supra,* 383 U.S. at 334. It requires submission of any "change" in election laws. *Allen v. Board of Elections,* 393 U.S. at 549.

It should be noted that we have said that Section 5 clearly suspends, and requires submission of, "new" vot-

ing laws; i.e., "changes" in election laws. We contend that Section 5 is equally clear that it authorizes the Justice Department to disapprove only the "change", because, as was stated in *South Carolina v. Katzenbach, supra*, 383 U.S. at 335, the purpose of Section 5 was to prevent the contrivance of new rules to evade the suspension of literacy tests. However, the Justice Department interprets Section 5 differently. They contend that the "change" only "triggers" the requirement of submission and ". . . does not necessarily limit the standards of review or the permissible range of objection resulting from such review." (Plaintiff's Brief to the District Court, pp. 12-13.)

Now, if Section 5 does not limit the Justice Department's "standards of review" or its "range of objection", then the covered and affected States certainly should be advised as to what does.

The Justice Department's contentions made it imperative that Georgia raise the question: Does Section 5 empower the Attorney General to disapprove a law which has not "changed" within the meaning of that Section?

In the case at bar, the Justice Department notified the Georgia General Assembly, in the closing days of its session, that the use of multi-member districts, in combination with the designation of posts and majority elections, was disapproved. The Justice Department did not say to the General Assembly that multi-member districts numbered 62, 65, 74, 76, 77, 85-89, 102, 114, 115, 122, 124 and 128 were disapproved as being new multi-member districts, or as being multi-member districts with changed boundaries, or as having had the number of

members changed. By disapproving the use of multi-member districts as such, the Justice Department told the Georgia General Assembly to subdivide, into single member districts, all multi-member districts, including 17 which the Government later conceded in court either contained no cognizable racial minorities at all or had such dispersed minorities that the subdividing of those districts would not increase their voting strength.

The Justice Department objected to the use of multi-member districts in principle, notwithstanding *Whitcomb v. Chavis*, 403 U.S. 124 (1971). They objected to the system, not to its application in particular changed circumstances. Although the application of many multi-member districts had changed, the use of multi-member districts as an election system has not changed (since 1880). Thus, Georgia seeks review of the scope of the Attorney General's power under Section 5.

Glynn County, Georgia, offers a perfect example of the point we hope to make. Glynn County was a 2 man multi-member district in 1961 (Ga. Laws 1961, p. 111), a 2 man multi-member district in the reapportionment of 1965 (Ga. Laws 1965, p. 133), a 2 man multi-member district in the reapportionment of 1967 (Ga. Laws 1967, p. 192), a 2 man multi-member district in the reapportionment of 1968 (Ga. Laws 1968, p. 214), a 2 man multi-member district in the reapportionment of 1971, and a 2 man multi-member district in the reapportionment of 1972. Not since 1941 has there been any change whatsoever in the 2 man multi-member representation of Glynn County in the Georgia House of Representatives (see Ga. Laws 1951, pp. 26-27, Ga. Laws 1941, pp. 348-349), yet that district was disapproved by the Justice Department.

The Attorney General's objection to the use of multi-member districts, as such, is invalid, we submit, because Georgia was using multi-member districts, as such, in 1961, and continued to do so, with District Court approval, throughout the 1960's and in its 1971 and '72 reapportionment plans.

Permit us momentarily to assume a hypothetical situation for the purpose of illustrating the awesome scope of the power claimed by the Justice Department. The Georgia House of Representatives had 205 members in 1961. It had 205 members in the reapportionment of 1965. Assume that the 1972 reapportionment plan called for 205 members, but that the district lines were changed considerably as compared to 1961 and 1965. Under the Justice Department's interpretation of Section 5, the Attorney General could object to the continued use of 205 members because the change in district lines "triggered" the requirement of submission, but the Attorney General was not limited to objecting to that which had "changed". *Cf. Sixty-Seventh Minnesota State Senate v. Beens*, 92 S.Ct. 1477 (1972).

We submit that the Justice Department exceeded its authority in objecting to laws as to which there had been no change. We submit, moreover, that this Court should make the determination if the Justice Department is to be allowed to make such objections. We further submit that the covered and affected States deserve to know the scope of the Justice Department's power of review of state voting and election law changes.

3. Does Section 5 Empower the Attorney General to Disapprove a State Law Which He Does Not Find to Be Discriminatory, But About Which He Is Unable to Reach a Decision?

In his March 3, 1972, letter disapproving Georgia's 1971 reapportionment plan, Assistant Attorney General David L. Norman wrote as follows:

> "An analysis of several recent federal court decisions, dealing with similar issues persuades me that a court would conclude with respect to this plan that the combination of multi-member districts, numbered posts, and a majority (runoff) requirement, along with the extensive splitting and regrouping of counties within multi-member districts, would occasion a serious potential abridgement of minority voting rights. Accordingly, I am unable to conclude that the plan does not have a discriminatory racial effect on voting."

This indecisive policy of denial is wrong, we respectfully submit. It is based upon Section 51.19 of the Attorney General's regulations (quoted above). However, those regulations have no statutory basis.

Although the Attorney General's regulations (§ 51.19) assert that in reviewing voting law changes, he is performing a judicial function, the Attorney General cannot set himself up as a court. Const. Art. III, Sec. 1 and Sec. 2,

In *Allen v. Board of Elections, supra,* 393 U.S. at 549, this Court said:

> "The Attorney General does not act as a court in approving or disapproving the state legislation."

If he were a court, the Attorney General could im-

pose a burden of proof on the submitting states, and he then perhaps could disapprove submissions (as his regulations provide) if he is unable to reach a decision within 60 days. But he is not a court, *Allen, supra,* and Congress could not and did not, in Section 5 or elsewhere, establish him as a court. Const. Art. III, Sec. 1, and Sec. 2.

If we are wrong in our contention and if the Attorney General is indeed a court, ". . . a surrogate for the District Court for the District of Columbia when he passes on Section 5 submissions . . .", as counsel for the Government argued to the court below (Transcript, p. 9), then as Government counsel argued, "If that be so, the burden of proof should not be different just because the state chooses to go through the Attorney General instead of through the District Court. . . ." (Transcript, p. 9). But, if the Government is correct in its contentions and regulations, then the *Allen* statement (quoted above) was wrong, and *Katzenbach, supra,* was wrong and Section 5 is unconstitutional as an attempt to ordain and establish the Attorney General as a court, with power extending to cases in law arising under the constitution and laws, to which the United States is one party and a State is the other party, all in violation of Article III of the Constitution.

In *Whitcomb v. Chavis,* 403 U.S. 124, 144 (1971), the Court reiterated its insistance that the challenger carry the burden of proof that multi-member districts unconstitutionally operate to dilute or cancel the voting strength of racial elements. The Justice Department has resorted to a new regulation (§ 51.19) for the purpose of perpetuating discrimination against the covered States, in the face of *Whitcomb.*

We submit that the validity of the Justice Department's judicial burden of proof standard, resulting in its indecisive denial policy, should be reviewed by this Court. In fact, we cannot imagine that the Justice Department does not want this issue, as well as the other questions to be raised on appeal, decided by this Court.

4. Does the Attorney General Have the Power to Extend the 60 Day Time Limit Congress Set in Section 5?

By letter dated March 24, 1972, the Justice Department disapproved the House of Representatives reapportionment plan adopted on March 9, 1972, the last day of the 1972 regular session. The ground for disapproval was Georgia's failure to satisfy the Justice Department's earlier objection to multi-member districts combined with designated posts and majority (runoff) election requirement.

If Section 5 is applicable to reapportionment and valid as applied, and if the burden of proof standard and indecisive denial policy are valid, then the March 9, 1972 reapportionment plan was timely disapproved and thus is suspended.

However, the reapportionment plan adopted at the 1971 special session was submitted, appellants contend, to the Justice Department on November 5, 1971. Its disapproval by letter dated March 3, 1972, was not within the 60 day time limit Congress placed on the Attorney General in Section 5, and hence the 1971 plan is in effect, appellants contend.

The Justice Department contends however that the 60 day time limit did not commence until January 6,

1972, by virtue of the Attorney General's regulations, Sections 51.18(a) and 51.10. If that be so, the March 3, 1972 objection was timely.

The Justice Department's argument assumes, however, the validity of the Attorney General's regulations, whereas none of the cited authorities (5 U.S.C. 301, 28 U.S.C. 509-510, 42 U.S.C. 1973c, and Chapter I of Title 28 of the Code of Federal Regulations) authorizes the Attorney General to extend, by regulation or otherwise, the 60 day limit fixed by Congress for the suspension of State election laws.

Section 5 itself provides that the covered and affected States may enforce changes in their voting laws if the change has been submitted to the Attorney General and he ". . . has not interposed an objection within sixty days after such submission. . . ." The purpose of the provision was to limit the time in which changes in voting laws were held in abeyance, and to expedite effectuation of those changes. *Allen v. Board of Elections, supra,* 393 U.S. at 549. If it had seen fit to do so, Congress could have put no time limit on the Attorney General, providing that a change would be effective when and if approved by him. Congress did not do so. Instead it enacted a time limit.

The Government has argued that Congress certainly did not expect that changes as complex as reapportionment plans could be reviewed within 60 days and without supplying the Attorney General with such other information as he might request. Our response to that argument is that Congress did not intend for the Attorney General to be reviewing reapportionment plans in the first place. If Congress did so intend, then the At-

torney General should ask Congress for additional time, and funds to employ researchers and statisticians to compile the information he wants. Section 5 is onerous enough without burdening the States with additional duties under it.

CONCLUSION

It is submitted that the District Court erred in its reading of *Katzenbach*, *Allen* and *Perkins* and in accepting the arguments of the Government. Moreover, it is submitted that the covered and affected States deserve the consideration of this Court, no matter what the outcome, on these issues of federal-state relationships. Even States not presently affected may be concerned in the future by extensions of the Voting Rights Act or similar uncommon exercises of power.

We believe that the questions presented by this appeal are substantial and that they are of such public importance as to warrant consideration by this Court.

Respectfully submitted,

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